

# REASONS CONCERNING THE RESTRICTION OF SOME RIGHTS IN COMPLIANCE WITH THE PROVISIONS OF ART. 53 OF CONSTITUTION

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## Abstract

*An essential dimension of the lawful state is represented by the consecration and guaranteeing of the fundamental rights and liberties, the ensuring of the optimum conditions for their exercising. The state authorities have the negative obligation to restrain from any arbitrary or excessive requirement that may restrict or condition the exercise of the constitutional right. In order to be legitimate and constitutional, any restriction of the exercise of the fundamental rights and liberties through the measures prescribed by the state's authorities, needs to have the character of exemption, not to affect the substance of the law and to fulfill all conditions stipulated by article 53 of Constitution. In relation to these premises we analyze in this study the constitutional institution of restraining some rights' exercising and the relevant aspects of jurisprudence. The observance of the principle of proportionality is one of the constitutional requirements in order that such a restrictive measure be legitimate. The main particularities of the principle of proportionality applied in the matter of restraining some rights' exercising are analyzed with reference to the jurisprudence of the Constitutional Court and the European Court of Human's Rights.*

**Keywords:** *Lawful state/fundamental rights and liberties/restriction of the exercise of the fundamental rights/principle of proportionality/constitutional requirements*

## Introduction

A Romanian author emphasized that freedom has a meaning provided the limit exists, as to manifest itself, it must depend on something, to circumscribe itself to certain coordinates. "Human freedom is construed in a bundle of limits that are the very condition of its exercise"<sup>1</sup>.

Consecration and guaranteeing of human rights through domestic and international regulations does not exclude their limiting. Moreover, the existence of such unconditional, theoretical rights can not be accepted in a democratic constitutional system. The lack of the exercising limits and conditions prescribed by law, constitutions or international legal instruments can lead to arbitrariness or abuse of law, because it would not allow the differentiation of illegal behavior from the legal one. This idea is expressed by Article 4 of the French Declaration of Rights of Man and Citizen: "the exercising of each man's natural rights has no limits, others than those which provide every member of society the possibility to exercise those rights." Also, the legal doctrine noted that in the relationships between the rights holders „one's freedom begins where stops the other one's freedom, since the condition inherent to the person is its relationship with others"<sup>2</sup>.

The social order and stability implies tolerance and mutual respect among the subjects participating to

social relations. The exercising of fundamental rights and freedoms must not conflict with the order existing in social life: the coexistence of freedoms and social protection are the two commandments underlying the limits enacted by positive law"<sup>3</sup>. The difficulty lies in finding the most suitable solutions that would balance the individual interests and public interest while guaranteeing the fundamental rights and freedoms in situations in which could be limited or restricted their exercising.

In the relationship between the rights and freedoms, on one hand, and society on the other hand, two extreme attitudes have been outlined: sacrificing of rights and freedoms in the interests of social order, or the preeminence of rights and freedoms, even if thus are sacrificed the interests and order social<sup>4</sup>. None of these solutions is justified by the imperatives of authentic democracy and the requirement to achieve a balance and social harmony. The Constitutional regulations, to be effective, must achieve a balance between citizens and public authorities, then between public authorities and of course, citizens. It must also ensure protection to the individual against the arbitrary interference of State in the exercise of its rights and freedoms<sup>5</sup>. Therefore, the limits imposed to the fundamental rights and freedoms must be appropriate to a legitimate purpose, it can be: protection of society, social, economic and political order, of lawful order, or protection of the

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<sup>1</sup> Gabriel Liiceanu, *Despre limită*, "About the limit", Humanitas Publishing House, Bucharest, 1994, pg. 11.

<sup>2</sup> Ion Deleanu, *Instituții și proceduri constituționale*, "Constitutional Institutions and Proceedings", Servo-Sat Publishing House, Arad, 1998 vol. I, pg. 269-270.

<sup>3</sup> Jean Rivero, *Les Libertés publiques*, P.U.F., (Ed.1973), pg. 106.

<sup>4</sup> Ion Deleanu, *quoted works*, vol. I, pg. 205.

<sup>5</sup> Ioan Muraru, *Protecția constituțională a libertăților de opinie*, "Constitutional Protection of the Right to Opinion" Lumina Lex Publishing House, Bucharest, 1999, pg. 16-17.

rights of others. The limits must not deprive of contents the rights themselves, but must ensure the exercise thereof in such situations.

The existence of certain limits on the exercise of fundamental rights is justified through constitutional protection or the protection through important international legal instruments or state human values. However, it is not acceptable that in the name of these values, the state authorities to limit discretionary and abusively the exercise of rights which in turn are constitutionally guaranteed. In this case one might come to destroying democracy under the pretext of defending it.

The principle of proportionality, understood as the appropriate relationship between the measures restricting the exercise of human rights and freedoms, the factual situation and the legitimate aim pursued represents a criterion for determining these limits, avoiding the excess power, but also a guarantee of the constitutional rights consecrated<sup>6</sup>.

### Paper Content

In doctrine, the legal instruments and jurisprudence, the limits of the fundamental rights and freedoms were differentiated by several criteria.

A first distinction is between the limit and limitation of fundamental rights<sup>7</sup>. Thus, the limit is a content item of the law and is necessary for its exercise. In contrast, the limitation (restriction) limits the exercise of a right by measures taken by the competent state authorities in view of a legitimate aim.

Another author<sup>8</sup> believes that there are limits imposed on the fundamental rights and freedoms in order to facilitate their implementation, and on the other hand, limits aiming at "the protection of society, its socio-economic and political and legal order"<sup>9</sup>. The limits deriving from such a purpose may be absolute, imposed by the demands of social life, in all circumstances for the protection of the essential values of the state and society, and on the other hand may be relative, those that do not apply in a general and permanent manner, but only to some of the rights and freedoms, or only in a certain time or in a determined situation, or only to certain subjects<sup>10</sup>.

In our view we can distinguish: a) Conditions for the exercise of rights and freedoms that are found even in their legal and constitutional definition contents; b) restrictions, exemptions,

suspension, loss of rights, which have an exception and temporary nature, being measures taken

by the state authorities to protect or achieve a legitimate aim.

State interference in the exercise of the fundamental rights and freedoms can be realized in principle by restricting and suspending certain rights or by derogations. These modalities are regulated in constitutions and international legal instruments. Avoiding any misuse of state authorities and guaranteeing of the rights and fundamental freedoms in such situations requires constitutional regulation, but also in the international legal instruments of the conditions justifying such measures' enacting.

There are constitutions governing the institution of certain rights' restriction in certain circumstances<sup>11</sup>, the possibility of suspending certain rights or freedoms<sup>12</sup> or in cases that due to the abusive exercising of a right, its exercise is being lost<sup>13</sup>.

Romania Constitution imposes conditions on the exercise of certain rights or freedoms. Thus, the freedom of movement is exercised under the conditions established by law (Article 25, para. (1)). Physical person may dispose of oneself, if not violating the rights and freedoms of others, public order or morals (Article 26, para. (2)); a person's right to access information of public interest can not be restricted, but should not be prejudicial to the protection of young people or national security. (Art. 31 paragraph (3)); the right to strike can only be exercised under law, which sets its limits (article 43, par. (2)); the content and limits of ownership right are determined by law (Article 44 para. (1)); the freedom of expression may not harm the dignity, honor, privacy of person or the right to own image (article 30, par. (6)); meetings may be organized and held only peacefully, without any kind of arms (39).

The restriction of certain rights or freedoms is governed by Article 53 of the Constitution. These are provisions of principle, which refer to the measures taken by state through law or government ordinance that represents interference with the exercise of constitutionally guaranteed rights. In order not to affect the substance of the right, such measures are temporary and also, in order to be constitutional, must comply cumulatively with the conditions provided by article 53. There are also constitutional provisions which restrict the exercise of some rights, the restrictions having a permanent character. The restrictions are usually specific to the legal content of the law constitutionally consecrated. Thus, the exercise of individual freedom may be restricted by search, detention or arrest (Article 23). Inviolability of home

<sup>6</sup> For developments see: Andreescu Marius, *Principiul proporționalității în dreptul constituțional*, "Principle of proportionality in the Constitutional Right", CH.Beck Publishing House, Bucharest, 2007.

<sup>7</sup> Doina Micu, *Garantarea drepturilor omului*, "Guaranteeing the Human Rights", All Beck Publishing House, Bucharest, 1998, pg. 141.

<sup>8</sup> Ion Deleanu, *quoted works*, vol. I, pg. 205.

<sup>9</sup> *Ibidem* pg. 205.

<sup>10</sup> *Ibidem* pg. 205. See Jean Rivero, *quoted works*, pg. 171-175.

<sup>11</sup> On this meaning to remember provisions of art.18 of Portugal Constitution; art. 19, paragraph 1 and 2 of German Constitution and provisions of article 53 of România Constitution.

<sup>12</sup> Art. 55 of Spain Constitution.

<sup>13</sup> Art. 18 of German Constitution.

may be restricted under the terms of article 27, par. (2). The provisions of article 36, par. (2), prohibit to certain categories of persons the right to vote. The provisions of article 40, par. (3) prohibit such professional categories the right to join political parties.

There are differences between restrictions and derogations, and on the other hand, that can cover the exercise of rights and fundamental freedoms.

Restrictions are measures considered needed in a democratic society, inflicted in order to achieve public interest or to protect the rights and freedoms of others. In this respect, the provisions of article 18 of the Convention states that: "... restrictions... can not be applied unless on the purpose for which they were intended."

With all specific aspects, arising from Constitution or international legal instruments, can be identified common conditions for the legitimacy of restrictions: be prescribed by law, be necessary in a democratic society, not be discriminatory, be appropriate at least to one of purposes provided by law and justifying circumstance. Compliance with these conditions must be achieved cumulatively. In this way the fundamental rights are guaranteed and is removed the arbitrary interference of state authorities in their pursuit.

Exemptions are wider restrictions of rights and fundamental freedoms and can be decided by States in emergencies. Restrictions may aim, in principle, any fundamental right, as opposed to derogatory measures that may concern only some human rights guaranteed by the international legal instruments.

From the international legal instruments, to which I referred, results that the derogations, in order not to be arbitrary, must meet the following conditions: must be applied only in exceptional circumstances; be strictly appropriate to the facts; be compatible with other obligations that States members adjusted to the international law; not be discriminatory; the states that make use of the right of derogation to announce the relevant international fora.

There are also absolutely guaranteed rights (absolute rights) in that no restrictions or derogations are being allowed. Obviously, we are referring to the right to life; the right not to be subjected to torture or to any kind of inhuman or degrading treatment or punishment.

The principle of proportionality is a guarantee in all circumstances when the exercise of a right or fundamental freedom is subjected to a condition, restriction, suspension or exemption. The principle of proportionality, applied in this matter has into consideration the achieving of a fair balance between individual interests and the public interest or private interests which corresponds to the fundamental

subjective rights, consecrated and guaranteed constitutionally.

Regarding the Romanian constitutional provisions related to the restriction of fundamental rights and freedoms in the literature in specialty, a distinction is made between the common circumstances to restrict the exercising of certain rights that form the subject for the regulation of provisions of article 53 of the Constitution, and secondly the special circumstances, specific to certain rights and freedoms. The common restriction circumstances are of temporal nature, are essentially fortuitous, while the special circumstances are permanent<sup>14</sup>. The quoted author stresses that such circumstances should be expressly recognized as "not being the product of conventionalism"<sup>15</sup>.

Although these circumstances are common, they can justify the restriction having into consideration the nature of the right or freedom. Thus, no circumstances can justify the restriction of the right to life or the right not to be tortured.

Romania Constitution uses a simple and efficient method for regulating the restriction of exercising certain rights and freedoms (common circumstances) by provisions in one single article. The provisions of Article 53 allow the restriction of certain rights and freedoms, but only conditioned<sup>16</sup>. The issue of interpretation and application of the provisions of Article 53 is particularly complex because the restrictions can aim the exercise of any right or fundamental freedom consecrated and guaranteed by the Constitution, except those regarded as absolute. The complexity is due to the diversity of concrete situations justifying the restriction of certain rights.

The rules imposed by the provisions of Article 53 have the value of a constitutional principle, because they are applicable to all fundamental rights and freedoms of citizens.

In the version prior to revision of Constitution, the provisions of article 49 indicated that the restraints can be achieved only by law, if necessary, according to the following purposes: "protection of national security, public order, health or morals, rights and freedoms of citizens, the conduct of criminal investigation, preventing of consequences of a natural disaster, or of any extremely severe catastrophe." At the same time, the restriction should not affect the existence of the right or freedom and must be proportional to the situation that caused it.

Through the Law amending the Constitution on September 18, 2003, were modified the provisions of Article 49, and by the republication of Constitution was given a new numbering of the Articles, Article 49 becoming Article 53. The initial rules in place for the restriction of some rights exercising have been

<sup>14</sup> Ion Deleanu, *quoted works*, vol. II, pg. 123; See decision no.13/ 1999 of Constitutional Court, published in the Official Gazette no.178/1999.

<sup>15</sup> *Ibidem*, *quoted works*, vol. II, pg. 123.

<sup>16</sup> Ioan Muraru, Simina Elena Tănăsescu, *Drept constituțional și instituții politice*, "Constitutional Right and Political Institutions, All Beck Publishing House, Bucharest, 2003, vol. I, pg. 174-176.

maintained but two more conditions have been added: the restriction must be "necessary in a democratic society" and another condition is that the restrictive measure be applied "nondiscriminatory". In this way, the Romanian Constitution perceived in this matter the most important rules in the international legal instruments in the matter and capitalized C.E.D.O jurisprudence.

If making a comparative analysis between the Romanian constitutional provisions and those contained in certain international legal instruments governing the conditions for the restriction of certain rights and freedoms exercising, some differences can be found. For our study is of interest that the provisions of Article 53. (2) of Constitution expressly consecrates proportionality as a condition that must be met in case of restriction of certain rights exercising, while in most international legal instruments this condition results implicitly out of the regulations content and is deduced by way of interpretation, by the jurisprudence of international courts.

To identify the peculiarities of the principle of proportionality, applied in this matter, it is useful to highlight some aspects of doctrine and jurisprudence on the interpretation and application of Article 53 of the Constitution.

The doctrine asserted that, in case the legislator restricts the exercise of certain rights without indicating expressly the constitutional background, it "does not remove the obligation of a verification within the procedure for monitoring the legitimacy of the constitutional law, if the measure thus established constitutes a limitation of a right"<sup>17</sup>. In recitals of Decision No. 4/1992 of Constitutional Court results that under the assumption that the legal provision subjected to a control, constitutes a limitation of a constitutional right, it is legitimate only in cases falling within the limiting situations expressly provided by Article 53 of Constitution<sup>18</sup>.

The Constitutional Court held that the provisions of Article 53, have into consideration the fundamental rights and freedoms contained in Chapter II, Section I of Constitution, and no other rights<sup>19</sup>. Our Constitutional Court, interpreting the provisions of Article 53 in relation to the provisions of article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the distinction was made between the loss and restriction of a right. The last situation is envisaged by the provisions of Article 53. "The Court finds that the invoking of provisions of

article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms has no bearing in the cause because these provisions apply to deprivation of liberty and not to restriction of freedom"<sup>20</sup>.

At the same time, our Constitutional Court decided that the restriction of a right must be temporary, being instituted only for the time period the causes that led it are acting, which are limitative consecrated by para (1) of Article 53 of the Constitution<sup>21</sup>.

Whenever the restriction of a right exercising is realized in order to defend the rights of citizens, restrictive measures are legitimate only in consideration of a particular law, as without this restriction, that right would be affected<sup>22</sup>. The restrictions brought upon the right exercising should not bring touch to the substance of this right. The Constitutional Court has established that through the law can be disposed certain restrictions of ownership, but they should not bring touch to this very right substance. These restrictions can be established in regard to the object of the right or other attributes of law, for the protection of the rights of persons or the general social and economic interests<sup>23</sup>.

Constitutional Court jurisprudence distinguishes the restriction of certain rights related to the circumstances in which the legislator conditions the exercise of a right. In this regard it was decided that the seniority requirements established by article 19 of Law No.51 / 1995<sup>24</sup> on the legal profession, are seeking to enforce the right of defense in terms of competence, professional responsibility and practice experience, related to hierarchical level of the courts and to the complexity of the cases, so it is natural that they involve certain conditions, which cannot be regarded as affecting the right to work, but as measures to protect both the interests of the litigant and lawyer's<sup>25</sup>.

Also, the exemption by law of certain categories of citizens of the benefit of rights granted to others, who are in a different situation, does not represent a limitation on the exercise of these rights. Therefore the provisions of Article 53 of Constitution are not applicable<sup>26</sup>.

Proportionality is a condition of constitutionality of the measures ordered by law or by ordinances, through which is restricted the exercise of some fundamental rights and freedoms, condition expressly stipulated by provisions of article 53, par. (2) of Constitution. The Analysis of the particularities of this principle must be carried out systematically in the

<sup>17</sup> Ioan Muraru, *Restrângerea exercițiului unor drepturi sau libertăți*, "Restraining the exercise of some rights or freedoms", in Constitutional studies, Actami Publishing House, Bucharest, 1995, pg. 199.

<sup>18</sup> Decision no. 4/1992, published in the Official Gazette no. 192/1992.

<sup>19</sup> Decision no. 19/1999, published in C.D.H., 1999, pg. 308.

<sup>20</sup> Decision no. 239/2001, published in the Official Gazette no. 838/2001.

<sup>21</sup> Decision no. 83/1999, published in C.D.H., 1999, pg. 582.

<sup>22</sup> Decision no. 139/1994, published in C.D.H., 1994, pg. 84.

<sup>23</sup> Decision no. 19/1993, published in C.D.H., 1992-1993; Decision no. 147/1997, published in C.D.H., 1998.

<sup>24</sup> Republished in the Official Gazette no. 113/2001.

<sup>25</sup> Decision no. 256/1997, published in the Official Gazette no. 134/1998.

<sup>26</sup> Decision no. 115/1999, published in the Official Gazette no. 522/1999.

context of the Article 53. Express consecration of a particular aspect of principle of proportionality, through the provisions of article 53, par. (2) changes the proportionality, from a rule of moral or opportunity into a law's constitutionality condition, while the Constitutional Court has the power to check the compliance with this principle.

Restriction of certain rights or freedoms by law represents a requirement of the state in the exercising of those rights and freedoms, justified by achieving a legitimate aim. To avoid arbitrariness or excess of power by state authorities that adopt such measures, it is necessary to exist guarantees provided by the state, which need to be adequate to the constitutional purpose pursued, namely for the protection of the fundamental rights and freedoms in the concrete situations in which prejudice might be brought to them. The principle of proportionality is thus a constitutional guarantee that allows sanctioning by the constitutional court of the arbitrary interferences of Parliament or Government in those rights exercising<sup>27</sup>.

Therefore, the measures taken by the State through which is restricted the exercise of fundamental rights or freedoms, in order not to be abusive must be not only legal, i.e. disposed by law, or by a normative act equivalent as legal force to the law, but also legitimate (fair) that is necessary in a democratic, non-discriminatory society, proportionate to the situation causing them and not affect the substance of the law. The proportionality and necessity in a democratic society are criteria of evaluation, both for the legislator as for the judge, of the legitimacy of the restriction of certain rights and freedoms.

In the doctrine was pointed out that whenever the legislator brings a limitation in the exercise of a right or freedom, shall state expressly in the wording of that disposition, the provision, under constitutional article 53<sup>28</sup>. This statement aims implicitly the respecting of the principle of proportionality and corresponds to the principle of supremacy of Constitution: "The law is an enactment act, in the meaning that the legislator's will necessarily finds limits in the supremacy of Constitution, as a fundamental law of state and society"<sup>29</sup>. In such cases, the assessment made by the legislator or constitutional judge, is based on a proportional reasoning. The restriction of certain rights exercising is justified by the existence of diverse interests and in some cases, even contradictory. On one hand, the subjective interest of the fundamental rights holders, and on the other hand, the public interest or the need to guarantee the fundamental rights of other persons. In such circumstances, one of the interests backgrounds its constitutional legitimacy on a provision and the other one, on another constitutional

provision. The proportional reasoning involves the comparing of interests, so as the limiting of the exercise of a right or fundamental freedom does not exceed what is strictly necessary to satisfy the public interest or the rights of others.

The principle of proportionality, applicable in the matter of restriction of certain rights, is concretely determined by the meaning of the elements being compared, pending on which can be established whether the respective measure is either appropriate or not to the situation and intended purpose. Proportionality of the restrictive measures must be assessed in relation to a well-defined legitimate aim, whose significance is given where applicable, by the doctrine, statute or case law. The restrictive measure violates the condition of proportionality if the purpose for which it was prepared is generic, and does not indicate a particular right or fundamental freedom as legitimate aim<sup>30</sup>.

The purposes justifying the restriction of certain rights and related to which is appreciated the respecting of the principle of proportionality are expressly and limiting provided by article 53, par. (1) of Constitution. Their meaning is important to determine the proportionality of the restrictive measures.

Thus, by "national security", a newly introduced expression following the revision of Constitution, which replaces the term "national security" means "the existing state of legality, balance and social, economic and political stability and development of the Romanian national state, as a sovereign, unitary, independent and indivisible, for the maintenance of public order and the climate for unrestrained exercise of rights, freedoms and fundamental duties of citizens, according to democratic principles and norms settled by the Constitution"<sup>31</sup>.

"Public order" is the set of rules that ensures the safety of society, public welfare, social harmony, respect for law and for the legitimate decisions of public authorities.

"Public health" means health protection of whole population or part thereof.

"Public Morals" is all precepts of conduct, dependent on individual conscience and values of the community to which he belongs.

Ensuring the respecting of citizens' "rights and freedoms" is a requirement mainly due to the fact that the person belongs to a social collectivity, aspect implying the fact that the rights and freedoms of others require the same protection as their own rights and freedoms.

The "Criminal Instruction" is a component of lawful order and implies the succession of acts and

<sup>27</sup> Ioan Muraru, *Protecția constituțională a libertăților de opinie*, "Constitutional Protection of the liberties of opinion, quoted works, pg. 22-23.

<sup>28</sup> Ioan Muraru, quoted works, pg. 200-201.

<sup>29</sup> Ibidem, pg. 201.

<sup>30</sup> See Decision no. 139/1994 published in the Official Gazette no. 353/1994, Decision no. 75/1994, published in the Official Gazette no. 190/1994 and Decision no. 21/2000, published in the Official Gazette no. 159/2000.

<sup>31</sup> Dispositions of art.1 of Law no. 51/1991 regarding the national safety of România, published in the Official Gazette no. 163/1991.

deeds that form the criminal proceedings in all its phases and stages<sup>32</sup>.

Depending on the legitimate aim pursued is determined the "margin of appreciation" which the public authorities have to impose limitations to the exercise of fundamental rights and freedoms, as provided by Article 53 of Constitution. The limits of the right of appreciation of the competent state authorities and also the respecting of principle of proportionality, are established in our constitutional jurisprudence court, including by reference to C.E.D.O. jurisprudence.

Thus, the proportionality of the interference of state authorities is considered by the international court against the requirements of a democratic society, a concept found in the jurisprudence of the Constitutional Court.

Also, our constitutional court invoked other aspects of C.E.D.O jurisprudence: the restrictive measures are: proportionate to the legitimate aim pursued if national and institutional legislative system has adequate and sufficient guarantees against abuses<sup>33</sup>. There is a distinction between facts and valuable judgments. If the materiality of the first one can be proved, the value judgments are not able to be demonstrated in terms of their accuracy<sup>34</sup>. Therefore, the compliance with the condition for proportionality of the restrictive measures imposed on freedom of expression is appreciated differently depending on the nature of allegations. The proportionality can be regarded as a strict fitness unto the purpose of the restrictive measure, or there may be a greater margin of appreciation of authorities when the legitimate aim pursued is public morality, for instance<sup>35</sup>.

These are just some aspects of C.E.D.O. jurisprudence, invoked in the jurisprudence of the Constitutional Court of Romania, in case are to be analyzed the restrictive measures imposed by Parliament or Government, regarding the exercise of fundamental rights and freedoms.

The jurisprudence of the Constitutional Court of Romania contributed to identifying the features of proportionality principle applied in relation to guaranteeing the fundamental rights and freedoms, including in situations in which the competent state authorities have restrictive measures which must meet the conditions of Article 53.

In this matter, the Constitutional Court jurisprudence reveals defining characteristics of the constitutional principle of proportionality, which assumes the necessary adequacy of the constitutional guarantees conferred to fundamental rights and freedoms, to the finality pursued, namely the protection of the exercise of rights in concrete situations that could

be restricted. The applying of the principle of proportionality has a dual significance: state guarantees on human rights become effective in specific situations; It is removed the arbitrary interference of public authorities in the exercise of these rights or in applying the measures for restricting their exercise, measures which constitute abuse of power.

Proportionality is a fundamental guarantee for exercising the fundamental right, subjected to a limit or circumstance. The existence of some limits or conditions for the exercise of some fundamental rights is justified by the idea of constitutional protection of some important human or state values.

In the meaning of those above Romania's Constitutional Court held: "The legislation, doctrine and jurisprudence have rejected and reject constantly the existence of absolute rights and liberties"<sup>36</sup>. Given this premise, the court identifies the Romanian constitutional provisions that set limits, conditions or restrictions in exercising of some rights<sup>37</sup>.

Although not expressly referring to the principle of proportionality, the decision No.13 / 1999 is important because it reveals the peculiarities of this principle applied in the matter of fundamental rights and freedoms protection. The need for a proper balance expresses the general principle of proportionality. At the same time, the conditions, limitations or restrictions imposed on some fundamental rights must be appropriate to the objective pursued by the constituent legislator, that of protection of the fundamental rights in situations in which it can be conditioned or limited.

By several decisions, the Constitutional Court ruled that it has jurisdiction to verify the compliance with the proportionality requirement in case of certain rights' restriction. The Constitutional Court assumes this jurisdiction only if the proportionality is a condition of constitutionality of the law instituting the restriction of the right. "Unquestionably, the checking of proportionality is within the competence of Court's control, while the proportionality of restricting with the situation that has caused, it is a constitutionality prerequisite of the law that established the restriction of the right"<sup>38</sup>.

This finding of the Constitutional Court is important for several aspects: proportionality is regarded as a requirement of constitutionality which the law, setting up the restriction of the right, must follow. In this way the principle of proportionality is not only a simple state of fact, closed to opportunity, but is a legal requirement within the Court's controlling jurisdiction. The Court draws a distinction between the general principle of proportionality, the proportionality applied in other branches of law and the constitutional principle of proportionality applicable in matter of

<sup>32</sup> For developments see Ion Deleanu, quoted works, vol. II, pg. 121-122.

<sup>33</sup> See Case Leander versus Suedia., 1999.

<sup>34</sup> Case Lingens versus Austria, 2002.

<sup>35</sup> Case Wingrove versus United Kingdom, 2001.

<sup>36</sup> Decision no. 13/1999, M.Of. no. 178/1999.

<sup>37</sup> Decision no. 13/1999 quoted previously.

<sup>38</sup> Considerent no. 3 of Decision no. 71/ 1996, published in the Official Gazette no. 131/1996.

certain rights' restriction. The Constitutional Court competence refers only to the constitutional principle of proportionality, consecrated by Article 53 para (2) provisions. To be noted the interpretation of our Constitutional Court on the content of the principle of proportionality applied in this matter: the appropriateness of restriction to situation that caused it.

The Constitutional Court pointed out that proportionality must be analyzed and understood pending the legitimate purpose aimed for which is applied the restricting measure. This purpose has to be one of the stipulated limiting set of article 53, par. (1). Moreover, then this, because the law through which is ordered the restriction of a right's exercising, to respect the principle of proportionality, the reference to the legitimate aim must not be generic, but it needs to be determined. Analyzing the restricting of the right to free movement, the Government Ordinance no.50 / 1994, the Constitutional Court held that the restriction of a constitutional right is possible, in accordance with Article 53 of the Constitution "solely on account of a certain law, as a measure that is being imposed whereas without that restriction, that right would be severely undermined and, according to the principle of proportionality, only to the extent necessary, so that this right be not at least partly compromised ... or, in the absence of specifying in whose service the restriction takes place, from the simple reference to the social protection right (Article 1 of the Ordinance) or to social rights existing (Article 7 of the Ordinance) does not result neither that this restriction is imposed - as required by Article 53 of the Constitution - nor that it is proportional the situation that caused it - as required by paragraph 2 of the same Article"<sup>39</sup>.

The argumentation of proportionality reasoning, which in the matter of certain rights' restriction involves the adequacy of the restrictive measure to the situation in fact, but also to the legitimate aim pursued, is used in the jurisprudence of Constitutional Court. Analyzing the respecting of principle of proportionality, in the event of exceptions of unconstitutionality regarding the provisions of Article 148, paragraph 1, letter h of the Criminal Procedure Code, our Constitutional Court found that principle of proportionality is satisfied, having into consideration both the provisions of article 18 of the Convention and the provisions of article 53, par. (2) of Constitution. It was found that the preventive arrest measure is necessary for conducting a criminal investigation and proportional to the situation that has caused it<sup>40</sup>.

In the jurisprudence of Constitutional Court, the argumentation of proportionality is revealed under the form of a fair balance analysis that should exist between two constitutionally protected rights, balance which determines simultaneously their limits of their exercising<sup>41</sup>.

The Constitutional Court stressed that the principle of proportionality, under article 53, par. (2) of Constitution, has as objective only the rights and fundamental freedoms<sup>42</sup>. In this regard, the Constitutional Court stated that the ratio between the offense committed and the penalty imposed, which must be a just one, exceeds the regulation sphere of Article 53, para. (2) of Constitution. "It is undeniable that the verification of proportionality belongs to the controlling powers of the Court, as long as the restriction has as objective the exercise of certain fundamental rights or freedoms"<sup>43</sup>.

The Constitutional Court jurisprudence contributes to the understanding and explaining of the principle of proportionality in cases in which it is noticed its interference in the principle of equality.

To be noted that the jurisprudence of our Constitutional Court, in matters of interpretation and applying of the principle of equality has evolved, from the admitting that different situations must be treated differently up to the recognition of new constitutional rights, respectively "the right to difference"

The uniformity has been consistently rejected in the jurisprudence of the Constitutional Court, in connection to the interpretation and applying of the principle of equality. To situations, which by their nature are different, must be applied a different treatment. The principle of proportionality means, in this case the required adequacy of legal regulation to the objective situation considered. Also, the proportionality requires the existence of a motivation "objective and reasonable" for a differentiated legal treatment applied to identical situations.

These rules are formulated in the jurisprudence of the Constitutional Court: "The principle of equality before the law requires the establishment of equal treatment for situations, which pending on the purpose aimed, are not different. Accordingly, a different treatment may not be only the exclusive appreciation expression of the judge, but must be rationally justified, in observing the principle of equality of citizens before the law and public authorities"<sup>44</sup>.

Applying the reasoning of proportionality, the Constitutional Court has reached to the recognition of a

<sup>39</sup> Considerent no. 16 of Decision no. 139/1994, published in the Official Gazette no. 353/1994; See Decision no. 75/1994, published in the Official Gazette no. 190/1994; Decision no. 21/2000, published in the Official Gazette no. 159/2000.

<sup>40</sup> Decision no. 26/2000, published in the Official Gazette no. 232/2000.

<sup>41</sup> Decision no. 57/1998, published in the Official Gazette no. 167/1998; On the same meaning see Decision no. 110/1995, published in the Official Gazette no. 74/1996.

<sup>42</sup> Decision no. 24/1997, published in C.D.H./1998, pg. 99-101; Decision no. 157/1998, published in the Official Gazette no. 3/1999.

<sup>43</sup> Decision no. 25/1999, published in the Official Gazette no. 3/1999; Decision no. 13/1999 previously quoted, by which the Constitutional Court ascertains that in the present case, it is not applied the principle of proportionality, stipulated by art. 53 of Constitution, Since the right to hunger strike is a fundamental right protected by constitutional norms.

<sup>44</sup> Considerent no. 5 of the Decision of Constitutional Court Plenum no. 1/1994, published in the Official Gazette no. 69/1994; On the same meaning see Decision no. 85/27<sup>th</sup> July 1994, published in C.D.H./1994, pg. 68-74.

fundamental right: "the right to difference". "In general, it is estimated that the violation of the principle of equality and nondiscrimination exists when applying a differential treatment to equal cases, without the existence of an objective and reasonable motivation or if there is a disproportion between the aimed purpose by unequal treatment and means used. In other words, the principle of equality does not prohibit specific rules. Therefore the principle of equality leads to underline the existence of a fundamental right, the right to difference, and as far as equality is not natural, the fact to impose it would mean to establish a discrimination"<sup>45</sup>.

### Conclusions

The jurisprudence issues discussed above lead to the conclusion that the understanding and applying of the principle of proportionality by the Constitutional Court is consistent with the meanings conferred to this principle, applied in the field of human rights' guaranteeing by C.E.D.O.

However, the jurisprudence of our Constitutional Court is not generous nor edifying in the application and interpretation of the principle of proportionality in ensuring fundamental rights and freedoms, which demonstrates that proportionality, as a principle of law in general and constitutional law

in particular, does not represent another object of major concern of jurisprudence.

Most times, the Constitutional Court refers to the criterion of proportionality generically, invoking the provisions of article 53 of Constitution. There are relatively few decisions of our Constitutional Court to

include elements of proportionality analysis. It is true that the interpretation and understanding of the principle of proportionality, considered to be one of the guarantees of fundamental rights and freedoms in situations where it is possible to limit or restrict their exercising, presents serious difficulties, given the diversity of concrete situations, the appreciation margin recognized by legislator, the nature of the right protected and not least the interpretative reasoning of Constitutional Court, which must be maintained to a high level of abstraction, setting the constitutionality of a provision by relating to the provisions of Constitution.

Summarizing, we can say that in the matter of fundamental rights and freedoms' protection, the principle of proportionality is explicitly or implicitly invoked by the Constitutional Court in the following forms:

- a) necessary appropriateness of constitutional and legal guarantees conferred to fundamental rights and freedoms, on pursued finality, namely the protection of the exercise of rights in concrete situations in which could be restricted;
- b) adequate relationship between the restrictive measures ordered by law, the situation in fact and the legitimate aim pursued, in accordance with Article 53 of Constitution;
- c) "argumentation of proportionality" as a means of interpretation used by the Constitutional Court to establish the existence of a fair, equitable ratio, between categories of rights and interests constitutionally protected.

### References:

- Gabriel Liiceanu, (1994) *Despre limită*, "About the limit", Humanitas Publishing House, Bucharest, pg. 11;
- Ion Deleanu, (1998) *Instituții și proceduri constituționale*, "Constitutional Institutions and Proceedings", Servo-Sat Publishing House, Arad, vol. I, pg. 269-270;
- Jean Rivero, (1973) *Les Libertés publiques*, P.U.F., pg. 106;
- Ioan Muraru, (1999) *Protecția constituțională a libertăților de opinie*, "Constitutional Protection of the Right to Opinion" Lumina Lex Publishing House, Bucharest, pg. 16-17;
- Andreescu Marius, (2007) *Principiul proporționalității în dreptul constituțional*, "Principle of proportionality in the Constitutional Right", C.H. Beck Publishing House, Bucharest;
- Doina Micu, (1998) *Garantarea drepturilor omului*, "Guaranteeing the Human Rights", All Beck Publishing House, Bucharest, pg. 141;
- Decision no.13/1999 of Constitutional Court, published in the Official Gazette no.178/1999;
- Ioan Muraru, Simina Elena Tănăsescu, (2003) *Drept constituțional și instituții politice*, "Constitutional Right and Political Institutions, All Beck Publishing House, Bucharest, vol. I, pg.174-176;
- Ioan Muraru, (1995) *Restrângerea exercițiului unor drepturi sau libertăți*, "Restraining the exercise of some rights or freedoms", in Constitutional studies, Actami Publishing House, Bucharest, pg.199;
- Decision no. 4/1992, published in the Official Gazette no. 192/1992;
- Decision no. 19/1999, published in C.D.H., 1999, pg. 308;
- Decision no. 239/2001, published in the Official Gazette no. 838/2001;
- Decision no. 83/1999, published in C.D.H., 1999, pg.582;
- Decision no. 139/1994, publicată C.D.H., 1994, pg.84;
- Decision no. 19/1993, published in C.D.H., 1992-1993; Decision no. 147/1997, published in C.D.H., 1998;
- Decision no. 256/1997, published in the Official Gazette no. 134/1998;

<sup>45</sup> Decision no. 107/1995, published in the Official Gazette no. 85/1995; See Decision no. 6/1996, published in the Official Gazette no. 23/1996; Decision no. 198/2000, published in the Official Gazette no. 702/2000; Decision no. 54/2000, published in the Official Gazette no. 310/2000; Decision no. 263/2001, published in the Official Gazette no. 762/2001.



- Decision no. 115/1999, published in the Official Gazette no. 522/1999;
- Decision no. 139/1994 published in the Official Gazette no. 353/1994;
- Decision no. 75/1994, published in the Official Gazette no. 190/1994;
- Decision no. 21/2000, published in the Official Gazette no. 159/2000;
- Decision no 13/1999, M.Of. no 178/1999;
- Decision no. 71/ 1996, published in the Official Gazette no. 131/1996;
- Decision no 75/1994, published in the Official Gazette no. 190/1994;
- Decision no 21/2000, published in the Official Gazette no. 159/2000;
- Decision no 26/2000, published in the Official Gazette no. 232/2000;
- Decision no 57/1998, published in the Official Gazette no. 167/1998;
- Decision no. 110/1995, published in the Official Gazette no. 74/1996;
- Decision no. 24/1997, published in C.D.H./1998, pg. 99-101;
- Decision no. 157/1998, published in the Official Gazette no. 3/1999;
- Decision no. 25/1999, published in the Official Gazette no. 3/1999;
- Decision of Constitutional Court Plenum no. 1/1994, published in the Official Gazette no. 69/1994;
- Decision no. 85/27<sup>th</sup> July 1994, published in C.D.H./1994, pg. 68-74;
- Decision no. 107/1995, published in the Official Gazette no. 85/1995;
- Decision no. 6/1996, published in the Official Gazette no. 23/1996;
- Decision no. 198/2000, published in the Official Gazette no. 702/2000;
- Decision no 54/2000, published in the Official Gazette no. 310/2000;
- Decision no. 263/2001, published in the Official Gazette no. 762/2001.