

Marius ANDREESCU

Court of Appeal Pitesti, Faculty of Economical Sciences and Law, University of Pitesti

Andra PURAN

Faculty of Economic Sciences and Law, University of Pitesti

Claudia ANDREESCU

National School of Political and Administrative Sciences Bucharest

THE CONSTITUTIONAL PRINCIPLE OF EQUALITY - LEGAL SIGNIFICANCE AND SOCIAL IMPLICATIONS -

Keywords

K

*Equality as a constitutional principle,
Philosophical and legal content of the principle of
proportionality,
Interference between the principles of equality and
proportionality,
Equitable balance,
Principle of equality and tax obligations*

Abstract

The equality in human rights and obligations, the equality of citizens before the law are fundamental categories of the theories on social democracy but also conditions of the lawful state, without which constitutional democracy cannot be conceived. In Romanian Constitution, this principle is consecrated in the form of equality of the citizens before the law and public authorities. There are also particular aspects of this principle consecrated in the Constitution. The constitutional principle of equality requires that equal treatment be applied to equal situations. This social and legal reality implies numerous interferences between the principle of equality and other constitutional principles. In this study, by using theoretical and jurisprudential arguments, we intend to demonstrate that, in relation to contemporary social reality, equality, as a constitutional principle, is a particular aspect of the principle of proportionality. The latter one expresses in essence the ideas of: fairness, justice, reasonableness and fair appropriateness of state decisions to the facts and legitimate aims proposed.

THE PRINCIPLE OF EQUALITY - A PARTICULAR CASE OF PROPORTIONALITY

The analysis of the link between the two principles of law must start from their meanings. The purpose is to determine their sphere of interference.

The principle of equality is consecrated in Article 16 of Romanian Constitution, in the form of equality of citizens before the law and public authorities. These provisions are corroborated with Art. 4, paragraph (2), which prohibits discrimination, according to the criteria mentioned. There are other Romanian constitutional provisions involving the principle of equality (Articles 4, 6, 38, 41, 44, 56 and 62). The Romanian constitutional provisions are in line with international regulations in the field. To remember the provisions of Articles 14 and 26 of the International Convention on Civil and Political Rights, that consecrates this principle and Article 24 regulating the causes of discrimination. The principle of equality is also stipulated by Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In the literature in specialty was shown that the constitutional principle of equality is characterized by polyformism. "Whether we consider it as an objective principle of law or a fundamental subjective right, it expresses itself through a series of pair - values that have already become commonplace, strict equality (relative equality, formal equality), material equality, equality before the law, equality by law, etc." (Tănăsescu, 1999, p.3). This polyformism explains the difficulty of defining this principle. The legal nature of the constitutional principle of equality is considered different in the comparative law: a principle of law, which is a means of guaranteeing the citizens' rights and freedoms, or as a subjective right. Also, the doctrinal and jurisprudential definitions are different, depending on the significance and peculiarities of the principle (For the analysis of the juridical nature of the principle of equality and the definition of the principle, see Tănăsescu, 1999, pp. 6 – 72; Muraru, Tănăsescu, pp. 163-165; Drăganu, 1998, pp. 185 – 187, Andreescu, Puran, 2014, pp. 204-231, Andreescu, 2007, pp. 288-312). Regarding the juridical nature of the constitutional principle of equality in Romanian doctrine, we remember the view according to which "the formulation of the present Romanian Constitution makes of the constitutional principle of equality a fundamental right, with the value of a general principle for the fundamental rights matter" (Tănăsescu, 1999, p. 11).

The general principle of equality, regulated by Article 16 of Constitution, refers to a formal legal equality and not to an equality of conditions. However, the equality before the law and public authorities does not involve the idea of uniformity, in the sense of applying to all citizens the same legal regime, regardless of their natural or socio-professional situation. The principle of equality implies that equal treatment should apply to equal situations. At the same time, it also supposes the right to differentiation in legal treatment, if the situations of citizens are different. In other words, to equal situations should correspond an equal legal treatment and, to the different situations, the legal treatment must be different. In this sense, the doctrine admits the existence of a *positive discrimination*, regulated even by some constitutional texts, imposing certain social protection measures. The Constitutional Court jurisprudence on the limits of the constitutional principle of equality "varies between a strict equality, sometimes assimilated with the non-discrimination principle, and a relative equality, a treatment equality which accepts the differentiation of the legal regime, according to the objective particularities of the concrete situations" (Tănăsescu, 1999, p. 17).

As a general principle of law, proportionality evokes the idea of correspondence or balance. The comparative logic, which is the essence of the proportionality reasoning, assumes the comparing of some objective situations and the ascertaining of their degree of identity. Should the situations be different, the applicable legal regime must be different. The general principle of proportionality, in this case, expresses the needed appropriation of the legal treatment with the objective situations to which it applies. In this way, *the reasoning of proportionality* requires an objective and reasonable motivation, in order not to reach to a *disproportion* between the purpose pursued, through an unequal legal treatment and the means used. Thus, the purpose of the law becomes the criterion according to which the situations are compared and in relation to which, the difference in the legal regime must be established (Tănăsescu, 1999, p. 40).

Therefore, the logic of the egalitarian reasoning, in which the factual situations are so similar that they necessarily require the identity of the legal treatment, is a particular aspect of the reasoning of proportionality, based on different situations comparison and, implicitly, the recognition of a right to difference. It can be said that the principle of equality is a particular case of the principle of proportionality. Therefore, the Romanian constitutional provisions, that consecrate equality as a general principle (Article 16), or the specific equalities, imply also the principle of proportionality.

A JURISPRUDENCE SCRUTINY OF THE CONSTITUTIONAL COURT REGARDING THE INTERFERENCE BETWEEN THE PRINCIPLES OF PROPORTIONALITY AND EQUALITY

The uniformity has been consistently rejected by the Constitutional Court's jurisprudence, in relation to the interpretation and application of the principle of equality. The strict equality before the law implies that, in equal situations, the treatment must be equal, without discrimination. If the situations are different, the treatment can only be differentiated, which implies the principle of proportionality. Consequently, a breach of the principle of equality arises when different treatment is applied to similar situations or when the same legal treatment is applied to situations which by their nature are different. Also, the breaching of this principle may also occur in situations where there is no objective and reasonable reasoning for a differentiated treatment of identical situations, or if the unequal legal treatment is not appropriate to the purpose of the law.

The jurisprudence of the Constitutional Court has evolved in this respect, starting from accepting that different situations may be treated differently, up to the recognition of new constitutional principles, namely the right to difference (Muraru, Constantinescu, 1997, pp 113-114; Tănăsescu, 1999, p. 41). The Constitutional Court ruled as inadmissible a difference of legal treatment on social criteria or categories of officials, as it would constitute a discrimination (Decision nr.6/1993, published in the Official Gazette No. 01/1993). It admitted that there may be situations that allow for particularities, but not every such case justifies a difference in the legal treatment, especially if the different legal treatment would be discriminatory. The Constitutional Court has established as unconstitutional the provisions of the War Veterans Act concerning the conditioning of the war veterans' quality, on the fact of not having fought against the Romanian army. In this case, there is an unjustified discrimination between the Romanian citizens and it is therefore necessary to ensure an "equal treatment for all those who have joined in foreign armies" (Decision nr.47/1994, published in the Official Gazette No.139/1994). These are identical situations, which involve identical treatment. The Constitutional Court also applied the principle of equality in other situations, considering either that the situations are so similar that there is no justification for the legal treatment differentiation or, if it exists, it represents a discrimination related to the criterion used (Decision nr.124/1995, published in the Official Gazette No.293/1995; Decision nr.35/1993, published in the Official Gazette No.218/1993; Decision nr.3/1994, published in the Official

Gazette No.155/1994; Decision no.114/1994, published in C.D.H. – 1994, pg. 324-328; Decision no.30/1998, published in the Official Gazette No.113/1998).

The rejection of uniformity and the need to differentiate the legal treatment according to different objective situations, without being discriminatory, is reflected in the jurisprudence of the Constitutional Court. Referring to the different situation of the students in private education and, on the other hand, of those in state education, the Court found that once they entered the chosen system, they are subjected to the rules of each system. So, in reality, the contested provisions do not discriminate, but offer different solutions for different situations (Decision no.70/1993, published in the Official Gazette No.307/1993. This Decision is invoked constantly in the Constitutional Court Jurisprudence, in matter.). In other words, the necessary adequacy of legal treatment to the objective situation considered is an application of the principle of proportionality.

This rule is formulated in the jurisprudence of the Court of Justice with a value of principle: "The principle of equality before the law requires establishing an equal treatment for situations which, depending on the purpose pursued, are not different. Consequently, a different treatment cannot be the sole expression of the judge's exclusive appreciation, but must be rationally justified, in respecting the principle of equality of citizens before the law and public authorities" (Reason 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.85/1994, in C.D.H. – 1994, pp 68 - 74).

The recent jurisprudence of our Constitutional Court confirms this interpretation of the principle of equality which refers to the equality of citizens before the law and public authorities and not to the equality of legal treatment applied to a category of citizens compared to another. Since the fundamental rights "represent a constant of the personality of the citizen, an equal chance granted to any individual", art.16, paragraph (1) of the republished Constitution aims the equality of rights between the citizens, and not the identity of legal treatment on the application of some measures, regardless of their nature. In this way, the Constitutional Court justifies not only the constitutionality of administering a different legal regime to certain categories of persons, but also the need for such legal treatment (See Decision nr.213/2004, published in the Official Gazette No.519/2004 and Decision nr.240/2004, published in the Official Gazette No.562/2004).

By applying this reasoning of proportionality, the Constitutional Court has come to the recognition of a fundamental right: *the right to difference*. "In

general, it is appreciated that violation of the principle of equality and non-discrimination exists when a differential treatment is applied to equal cases without objective and reasonable motivation or if there is a *disproportion* (s.n.) between the aim pursued by unequal treatment and the means used. In other terms, the principle of equality does not prohibit specific rules. That is why the principle of equality leads to emphasize on the existence of a fundamental right, *the right to difference* (s.n.), and to the extent that equality is not natural, it imposing would mean the establishing of the discrimination" (Decision nr.107/1995, published in the Official Gazette No.85/1996. See Decision nr.6/1996, published in the Official Gazette No..23/1996; Decision nr.198/2000, published in the Official Gazette No.702/2000; Decision nr.54/2000, published in the Official Gazette No.310/2000; Decision nr.263/2001, published in the Official Gazette No.762/2001).

The applying of the principle of proportionality has as legal consequences over the relativity of equality as a principle (Tănăsescu, 1999, pg. 41 - 44). The jurisprudence of the Court confirms that the principle of equality is a particular case of the general principle of proportionality, since the uniqueness of the legal treatment can be justified only in a particular hypothesis, that is, when the situations are the similar or the identical. Starting from the need to differentiate the legal treatment for different situations, the Constitutional Court has consistently considered that a protection measure applied to social or professional categories, in special situations, does not have the meaning of a privilege: "A measure of protection cannot have the meaning neither of a privilege nor of a discrimination and it is intended precisely to ensure, in certain specific situations, the equality of the citizens that would be affected in its absence" (Decision nr.104/1995, published in the Official Gazette No.40/1996). In these situations, the principle of proportionality imposes the necessary adequacy of the protection measures to the proposed purpose, namely, the ensuring, in special situations, of the equality of citizens.

Applying the same reasoning, which is based on the principle of proportionality, the Constitutional Court found that a derogatory regime from the common law regarding the execution of tax receivables is justified, by the fact that it foresees non-expiring of the forced execution of these debts (art. 137, paragraph Fiscal procedure). These special procedural rules are appropriate to some special situations, namely that the object of a forced enforcement is to collect the tax receivables that are sources of the state budget, "which is of a general interest" (Decision no.432/2004, published in the Official Gazette No.1176/2004).

In accordance with the principle of proportionality, applied in this matter, the difference in legal

treatment must have a rational and objective basis. The provisions of Art II from O.U.G. no.22/2003 (Published in the Official Gazette No.252/2003) are constitutional because, the difference in the legal treatment, in regard to the granting of compensatory payments introduced by criticized text, between the companies exempted category with majority state capital and other companies is justified by a rational and objective criterion, which lies in the existence of different situations, but also in the real possibility of the Government to bear such compensatory payments (Decision nr.457/2003, published in the Official Gazette No.49/2004). The different legal treatment, objectively and rationally determined by different situations, cannot create privileges or discriminations. The Constitutional Court rejected the exception of unconstitutionality of the provisions of Article 4, paragraph 2, letter a, Section 12 of Law no.543/2002 (Published in the Official Gazette No.726/2002.), noting that, according to legal provisions criticized all offenders in the same circumstances, benefit or are exempted from the pardoning "related to the nature of the offense and its content, in the legal formulation in force at the offense date." According to the Constitutional Court, the convicts that committed offences at different times, when the criminal law regulated in various drafting the contents of the respective offenses, are in different situations which justify the application of a different legal treatment "according to the legislator's free choice, without instituting of some privileges or discriminations" (Decision nr.546/2004, published in the Official Gazette No.107/2005. See Decision no.200/2004, published in the Official Gazette No.420/2004, also Decision nr.240/2004, previously quoted, through which the Constitutional Court noticed that dispositions of art.81, paragraph.3, art.86¹, paragraph.3 and art.86⁷, paragraph.3 Criminal Code are constitutional. The legislator didn't violate the dispositions of art.16 of Constitution, because the different juridical regime is justified by the different situation in which certain categories of persons are.)

In the same sense, the Constitutional Court has ruled that the withdrawal by the issuing authority of the visa, authorization or attestation, which would result in the rightful termination of the individual labor contract, for which concluding the existence of these documents is a mandatory condition, does not constitute a discriminatory legal treatment, but the application of differentiated legal treatment in relation to a different situation in which certain categories of employees are, that choose to exercise certain occupations or trades (Decision no.545/2004, published in the Official Gazette No.85/2005).

Unlike these situations where the principle of proportionality was observed, among others the

Constitutional Court found that the difference in legal treatment has no longer a rational and objective justification, which fact results in disproportionate and discriminatory treatment between persons in the same situation.

Thus, our Constitutional Court noticed the unconstitutionality of the provisions of Article 15, paragraph 1 of Law no. 80/1995, on the Status of Military Staff (Published in the Official Gazette No. 155/1995), which allows paying the parental leave for bringing up a child up to 2 years only to active military women, and not male military staff [Decision nr.90/2005, published in the Official Gazette No.245/2005. Instead the Constitutional Court ascertained the constitutionality of the dispositions art.38, paragraph.4, art.50, paragraph.1¹ and art.194 of Law no.19/2000, because the right of the citizens to pension is regulated both through general laws as through special laws in regard to certain social-professional categories that are found in particular situations. Therefore, the regime instituted through the criticized regulations is reasonable and justified, because the persons to which it refers to are in different situations. (Decision nr.116/2005, published in the Official Gazette No.228/2005)] The legislator may establish derogating measures from the common rules, subjected to respecting the following conditions: the existence of different situations; to be a rational and objective justification; the different legal treatment should not create a clear disproportion between different categories of persons; the derogating measures should not be discriminatory. Or, in the present case, the Constitutional Court rightly found that the complete abolition of certain categories of persons from the benefit of a form of insurance prescribed by law for all insured persons violates the constitutional principle of equality, representing discrimination, because the military staff in activity is not different from other categories of insured. Applying the same legal reasoning, the Constitutional Court found the unconstitutionality of art. 362, paragraph 1, letter d of Criminal Procedure (Decision no. 482/2004, published in Official Gazette 1200/2004). The legal provisions criticized, which stipulate that the injured party may appeal in regard to the criminal aspect of the case, and the civil party only in regard to the civil side, are contrary to the constitutional principle of equality. These two parties of the criminal trial are in an identical situation, namely in the situation of a person wronged in own rights by committing the offense. Therefore the inequality of treatment in regard to the access to the attack ways is t unjustified, including the proportionality criterion, since the defendant, the injured party, the civil party and the civilly responsible party have the same quality, respectively are parties to the criminal proceedings.

The interference between the principle of equality and the principle of proportionality also exists in case of national minorities' protection.

As stated in the Explanatory Report on the Frame - Convention for the Protection of National Minorities (Adopted by the Ministries Committee of European Council in Strasbourg on 10.11.1994), the states may adopt special measures to promote full and effective equality between the national minorities and those belonging to the majority. Such measures must be appropriate to the intended purpose. This requirement expresses the principle of proportionality, which is applied in order to avoid violating the rights of others or discrimination of other persons. The principle of proportionality requires that these safeguards are not to be extended, in time and in the sphere of application, beyond what is necessary to achieve the intended purpose.

The Constitutional Court applied the principle of proportionality by analyzing the constitutionality of some provisions of the Education Law no. 84/1995 (Published in the Official Gazette No. 167/1995 and republished in the Official Gazette No. 1/1996. See Decision nr.139/1999, published in the Official Gazette No.353/1999). The Romanian village in areas traditionally inhabited or in a substantial number of persons belonging to national minorities, if there is a sufficient demand, should, as far as possible, endeavor to ensure that persons belonging to the national minorities "have adequate learning opportunities for their minority language. The application of these measures shall be without prejudice to the learning of the official language or teaching in that language."

The measures taken by the State for the national minorities' protection must not contravene the requirements of the principle of equality of rights of the citizens and therefore should be "a reasonable ratio of proportionality between demand and possibilities, between demand and the means used or between the means employed and the aim pursued (Published in the Official Gazette No. 167/1995 and republished in the Official Gazette No. 1/1996. See Decision nr.139/1999, published in the Official Gazette No.353/1999).

The principle of equality, applied to the exercise of the right to vote, may also involve proportionality. The material conditions for exercising the right to vote may vary according to the diversity of situations. This involves a differentiated legal treatment, appropriate to every concrete solution, which is a proportionality relationship. It is stated in the doctrine that "the legislator can arrange so many different legal regimes, how many particular situations he encounters, without respecting the strict equality imposed on him with regard to the right to vote" (Tănăsescu, 1999, p. 219).

THE FAIR SETTLEMENT OF THE TAX DUTIES AND THE PRINCIPLE OF PROPORTIONALITY

The constitutional principle of equality has applications in electoral, judicial, fiscal, etc. (Tănăsescu, 1999, p.169-253). In all these areas, is applied the principle of proportionality, which assumes the right to differentiation in the equal treatment, if the situations in which are the citizens, are different.

For our research we have chosen to analyze the application of the constitutional principle of proportionality in tax matters for two reasons: the constitutional text (Article 56 paragraph (2)), recalls the general principle of justice and equity, and secondly the jurisprudence of the Constitutional Court is richer in this field than in other areas, with regard to the interference between the principle of equality and the principle of proportionality.

The application of the principle of proportionality in the field of taxation arises from the provisions of Article 56, paragraph (2) of the revised Constitution. "The statutory system of taxation must ensure the *correct* settlement of tax burdens."

These provisions must be analyzed through a systematic interpretation of constitutional texts in the matter, namely the provisions of Article 56, paragraph (1), which establish the obligation of citizens to contribute throughout taxes and duties, to the public expenditures and the provisions of art.139, according to which the taxes and duties can be established only by law or, in case of the local taxes and duties, are set by the local and county councils, according to the law. In accordance with the provisions of Article 56, paragraph (3), any other benefits shall be prohibited, other than those established in exceptional circumstances by law.

The principle of equality before fiscal law, as well as the need for a proportionality ratio between the possibilities of citizens and their contribution to public spending, was consecrated in the French Declaration on Human Rights and Citizen (1789) (Art.13 stipulates that: "for the maintenance of the public force and for administrative expenditures it is necessary a common contribution. This should be distributed equally among citizens, in relation to their own possibilities."). The Romanian constitutional provisions in matter are similar to the regulations existing in the constitutions of other states. Thus, the provisions of Article 53 of the Constitution of Italy establish the obligation of each one to participate to public expenditures, *in proportion* to own capacity, and the fiscal system should functions on the principles of progressivity. Similarly, the Constitution of Spain establishes in Art. 31, an obligation for all citizens to contribute to public spending, according to their possibilities,

through a fair tax system, based on principles of equality and progressiveness.

The provisions of Article 56, paragraph (2) of the Romanian Constitution have the meaning of a social justice and equity principle. As a principle of social justice, the correct setting of the fiscal burdens corresponds to the social character of the state, taking into account the need to protect the most disadvantaged social strata. As a principle of fairness is not intended to distort the equality of opportunities, that excludes any privilege or discrimination (Tănăsescu, 1999, p. 127). The Law on Public Finance (Law no. 10/1991, published in the Official Gazette No.23/1991) states in Article 5 that at the elaboration and execution of the budget are principles of universality, balance and reality, which is the materialization of the constitutional provisions above.

The provisions of Article 56, paragraph (2) of Constitution imply a necessary adjustment between the contribution of each and his possibilities. This adequacy can be imagined either in the form of a strict equality of everyone's contribution, or in the form of a necessary proportionality between each person's income and own share of burden (Tănăsescu, 1999, p. 194).

The proportionality ratio between the contribution of each and his / her possibilities also involves the possibility of reducing or exempting from the tax liability if their situation so requires.

The peculiarities of the principle of equality, applied in tax matters, have been highlighted in the legal doctrine, as well as in the jurisprudence of the Constitutional Court. The equality before the tax law is based on the universality of participation in tax burdens, which is a specific principle of the fiscal policy. According to the provisions of Article 56, paragraph (1) of the Constitution, all citizens are obliged to contribute to the public expenditures. This obligation implies the idea of equality before the tax law without any privilege or discrimination. The expression of the principle of equality, applied in this area, is uniformity. The applying of the constitutional principle of equality in tax matters translates through a very simple exigency, though quite constraining for the legislator: "so that the rule of universality be strictly respected within the same category of taxpayers, both the privileges and discriminations are formally forbidden" (Tănăsescu, 1999, p. 175).

The tax law may take into account the objective differences between various categories of taxpayers, but any differentiated legal regime must be justified by an objective difference in situation, in relation to the purpose of the law. In this respect, "the notion of category plays an important role in regard to the principle of equality in tax matters" (L. Favoreu, L. Philip, "Les grandes décisions du Conseil Constitutionnel," *quoted works*, pg. 551, quoted by Tănăsescu, 1999, pg. 182), and the

uniformity is not contrary to a certain trans-category differentiation (Tănăsescu, 1999, p. 192). The tax may be in proportional, progressive or regressive quotas.

In the literature in specialty was shown that the specificity of the tax, regardless of its form, "exists in the *proportionality* ratio that is established between the taxable amount and the levying, because in matter of taxation, proportionality is the true image of the principle of equality" (Tănăsescu, 1999, p. 194).

In this case, proportionality is a mathematical ratio, which can realize the idea of social justice, which results in a fair distribution of tax burdens, depending on the possibilities of each taxpayer. The progressivity of the tax is a particular aspect of the principle of proportionality applied in this area in the sense that the fair distribution of tax burdens means: the higher is a person's income, the more his tax contribution increases. Accordingly, proportionality is an expression of material equality, "when the quota increases at the same time with the taxable mass, we find ourselves in the presence of a progressive rate of material equality that seeks to equalize the real income through tax (Tănăsescu, 1999, p. 203).

A JURISPRUDENCE SCRUTINY OF THE CONSTITUTIONAL COURT OF ROMANIA, REGARDING THE FAIR SETTLEMENT OF TAX BURDENS

The Court applies the provisions of Article 56, paragraph (2) of Constitution, specifying the constitutional requirements that the law should abide in the field of taxes and duties. "Taxation must be not only legal, but proportionate, equitable, and not to differentiate taxes on the basis of groups or categories of citizens" (Decision no. 6/1993, previously quoted).

It is noted that the principle of proportionality is a condition of constitutionality of the law in tax matters but to be applied after the distinctions shown in the previous chapter. The Court applies the principle of proportionality, expressed in the provisions of Article 56 (2) of the Revised Constitutions, and finds that Article 7 (4) of the amended Law no. 32/1991 removes any inequality and discrimination in matter of taxes, being consistent with the constitutional provisions, according to which, "the higher is the total income of a person, the more his tax contribution increases" (Decision no. 91/1994, published in C.D.H. – 1994, pp. 287 – 292).

The Constitutional Court has applied the principle of proportionality as a relationship between the taxation base and the tax. Regarding the provisions of art.7, par. 6 of the Law no. 32/1991, the Court finds that by indexing, the tax grid does not change,

but the level of the taxable income is updated, correlated with the increase of the inflation index. "It is true that the tax increases, but only as a result of the increase of the taxation base" (in Decision nr.53/1994, published in C.D.H. – 1994, pp. 222 – 225). In this respect, the doctrine stated: "Also as the taxpayer's criterion for equality before the tax law, the taxable mass is the criterion according to which varies the legal regime of the tax. But the principle of tax justice, imposed by Article 53 (2) of the Constitution (Article 56 (2) of the Revised Constitution *n.n.*) imposes the uniformity of the legal regime of taxation as soon as the taxable amount is the same" (Tănăsescu, 1999, p. 205).

The principle of proportionality has also been applied by the Constitutional Court in other situations. Thus, proportionality implies a comparative reasoning that takes place between taxes and duties, and on the other hand, income, wages or benefits. A tax, in order to be legitimate, must be justified by the performance of a public authority. Otherwise, it is a financial impediment that will unconstitutionally restrict the exercise of a right (Decision nr.179/1994, published in C.D.H. – 1994, pp. 78 – 86). In the same sense, the Constitutional Court has established that the judicial stamp and the stamp duty are not a restriction of the free access to the justice because justice is a public service of the state and it is fair that part of the expenses be borne by those who make use of this service.

However, the taxes are not the price of the service, and the state has the possibility to determine the amount of taxes. The Constitutional Court is incapable of censoring the legislator's options and to replace its sovereign and full appreciation with its own appreciation, for it would thus turn into a lawmaker, practically thereafter (Decision nr.75/1997, published in the Official Gazette No.258/1997). Therefore, the introduction by the legislator of some exceptions from the general rule for the payment of stamp legal duties (tax exemptions) does not constitute a discrimination or violation of this constitutional principle (Decision nr.29/2000, published in the Official Gazette No.460/2000. In the same sense see also Decision no.532/2004, published in the Official Gazette No.91/2005, through which the Constitutional Court rejected the exception of un-constitutionality of the dispositions art.40¹ of the Law no.137/2002, published in the Official Gazette No.215/2002). The exclusive right of the legislator to determine taxes or duties and their amount or, as the case may be, tax exemptions or reductions in favor of certain categories of taxpayers cannot be arbitrary. These measures must respect the principle of proportionality found in the content of the concept of fiscal justice, in that the measures adopted to favor certain categories of taxpayers must be appropriate to the conjuncture circumstances and

also to the economic and financial situation of the country, during that period (Decision nr.292/2000, published in the Official Gazette No.702/2000). The application of this principle results also from the fact that any differentiation must be justified through the purpose of law, or economic and fiscal policy of the state. "No constitutional rule prohibits the granting of fiscal facilities to certain categories of taxpayers for the purpose of the good realization of economic, fiscal and social policy of the state" (Decision nr.62/1999, published in the Official Gazette No.308/1999). The Constitutional Court also opposed the idea of uniformity of the tax: "The legal regime of taxes is inevitably different, therefore involves also an economic and financial strategy. The uniformity of regulations in this area would result in the abolition of all taxing criteria and the purpose pursued by the legislator by means of financial leverage" (Decision nr.102/1995, published in C.D.H. 1995 – 1996, pp. 118 – 125). The Constitutional Court has determined that the tax should not be abusive. Thus, it must correspond to the purpose pursued by the legislator and be appropriate to the taxable mass. As we have seen, the taxable amount is the criterion by which the legal regime of the tax varies. Moreover, "the tax is based on a strict conception of proportionality, which refers exclusively to the notion of an arithmetical proportion" (Tănăsescu, 1999, pg. 195). Accordingly, the establishing of a tax without having a taxable amount in the objective sense, that is, an income that cannot be achieved, is abusive. "In order to eliminate any possibility of abusive taxation and taking into account the intention of the legislator ... it follows that the extension of the obligation to pay the tax, in considering some uncultivable lands, is unconstitutional, contravening art.53, paragraph (2) of the Constitution (2) of the revised Constitution *n.n.*), on which grounds no income tax can be established on an income impossible to achieve" (Decision nr.102/1995, published in C.D.H. 1995 – 1996, pp. 118 – 125).

THE PRINCIPLE OF EQUALITY IN RELATION TO THE MORAL LAW AND LEGAL LAW

This constant orientation of our constitutional court, regarding the constitutionality of the legal provisions in the matter of tax duties, through the prism of principle of proportionality, is also confirmed by the previous jurisprudence, we would say a historical one, of the Constitutional Court, contrary to the present social and legal realities that refuse to appeal to the great natural principles, coming out immutable from the very nature of human being. Thus, the establishing of a higher tax in charge of individuals that own two or more

buildings used as dwellings, does not violate the provisions of Article 16, paragraph (1) of Constitution (Decision nr.62/1999, published in the Official Gazette No.308/1999). To justify this solution, the Constitutional Court applies the principle of proportionality. It is ascertained that there is no discrimination against taxpayers who own several buildings compared to those who own a single building. There is sufficient reason for the introduction of the progressive tax in relation to the number of buildings owned in property, a reason which is expressed by the provisions of Article 56, paragraph (2) of the Constitution and implies a particular form of the principle of proportionality. This is also the opinion of the Court, which considers that the formula "the right settlement of the tax burdens" implies that the legislator must take into account when determining the categories of taxes, both the material situation of taxpayers, but also the increased availability of those who hold more properties to contribute more, through taxes, to public spending.

The current legislation setting a single tax rate irrespective of revenues, we believe is contrary to the principles of social justice, proportionality and equality, but also to the previous jurisprudence of our Constitutional Court, which, in the older jurisprudence, has given effect not only to constitutional texts in the field, but mostly, to the principles of justice and equity, true natural rights of man, superior to the force of the norms established by legal law, which reflects the temporal interests of the governors, and not the essence of the human nature that can be expressed in the realms of social realities only through the natural, immutable, absolute principles of: Justice, Equity (opposed to formal legal equality), Proportionality, Truth, Good and Freedom.

In theological and moral law, these principles can be considered imperatives which derive from the "*Commandment of Love*" considered by us to be the source of the authenticity and legitimacy of the moral law and juridical law, because it raises them from the narrow and limited sphere of constraint, as a factum exterior to human nature, transfiguring them in the natural dimension of freedom, the man being considered not only as an individual subjected to law enforcement, but as a person benefiting from the law. Freedom cannot characterize the individual who lives in the world of juridical law and even in the moral law, within the limits of reason, but only the *man as a person*, sovereign on himself, because he is governed by God, not by the world or by the individual "ego".

REFERENCES

Books

- [1] Andreescu M., 2007, Principiul proporționalității în dreptul constituțional, [Principle of Proportionality in the Constitutional Law], Bucharest, Ch. Beck Publishing House;
- [2] Andreescu M., Puran A. N., 2014, Drept constituțional –Teoria generală, [Constitutional Law – General Theory], Craiova, Sitech Publishing House;
- [3] Drăganu T., 1998, Tratat elementar de drept constituțional, [Constitutional Law - Elementary Treaty], Bucharest, Lumina Lex Publishing House;
- [4] Muraru I., Constantinescu M., 1997, Curtea Constituțională a României, [Constitutional Court of Romania], Bucharest, Albatros Publishing House;
- [5] Muraru I., Tănăsescu S. E., 2011, Drept constituțional și instituții politice, [Constitutional Law and Political Institutions], Bucharest, Ch Beck Publishing House, vol. I;
- [6] Tănăsescu S. E., (1999), Principiul egalității în dreptul românesc [Principle of Equality in Romanian Law], Bucharest, All Beck Publishing House.

Jurisprudence

- [1] Decision nr.6/1993 of the Constitutional Court of Romania, published in the Official Gazette No. 01/1993;
- [2] Decision nr.47/1994 of the Constitutional Court of Romania, published in the Official Gazette No.139/1994;
- [3] Decision nr.124/1995 of the Constitutional Court of Romania, published in the Official Gazette No.293/1995;
- [4] Decision nr.35/1993 of the Constitutional Court of Romania, published in the Official Gazette No.218/1993;
- [5] Decision nr.3/1994 of the Constitutional Court of Romania, published in the Official Gazette No.155/1994;
- [6] Decision no.114/1994 of the Constitutional Court of Romania, published in C.D.H. – 1994, pg. 324-328;
- [7] Decision no.30/1998 of the Constitutional Court of Romania, published in the Official Gazette No.113/1998;
- [8] Decision no.70/1993 of the Constitutional Court of Romania, published in the Official Gazette No.307/1993;
- [9] Decision of Constitutional Court Plenum no.1/1994, published in the Official Gazette No.69/1994;
- [10] Decision no.85/1994, in C.D.H. – 1994;

- [11] Decision nr.213/2004 of the Constitutional Court of Romania, published in the Official Gazette No.519/2004 and;
- [12] Decision nr.240/2004 of the Constitutional Court of Romania, published in the Official Gazette No.562/2004;
- [13] Decision nr.107/1995 of the Constitutional Court of Romania, published in the Official Gazette No.85/1996;
- [14] Decision nr.6/1996 of the Constitutional Court of Romania, published in the Official Gazette No.23/1996;
- [15] Decision nr.198/2000 of the Constitutional Court of Romania, published in the Official Gazette No.702/2000;
- [16] Decision nr.54/2000 of the Constitutional Court of Romania, published in the Official Gazette No.310/2000;
- [17] Decision nr.263/2001 of the Constitutional Court of Romania, published in the Official Gazette No.762/2001;
- [18] Decision nr.104/1995 of the Constitutional Court of Romania, published in the Official Gazette No.40/1996;
- [19] Decision no.432/2004 of the Constitutional Court of Romania, published in the Official Gazette No.1176/2004;
- [20] Decision nr.457/2003 of the Constitutional Court of Romania, published in the Official Gazette No.49/2004;
- [21] Decision nr.546/2004 of the Constitutional Court of Romania, published in the Official Gazette No.107/2005;
- [22] Decision no.200/2004 of the Constitutional Court of Romania, published in the Official Gazette No.420/2004;
- [23] Decision no.545/2004 of the Constitutional Court of Romania, published in the Official Gazette No.85/2005;
- [24] Decision nr.90/2005 of the Constitutional Court of Romania, published in the Official Gazette No.245/2005;
- [25] Decision nr.116/2005 of the Constitutional Court of Romania, published in the Official Gazette No.228/2005;
- [26] Decision no. 482/2004 of the Constitutional Court of Romania, published in Official Gazette 1200/2004;
- [27] Decision nr.139/1999 of the Constitutional Court of Romania, published in the Official Gazette No.353/1999;
- [28] Decision no. 91/1994, published in C.D.H. – 1994;
- [29] Decision nr.53/1994, published in C.D.H. – 1994;
- [30] Decision nr.179/1994, published in C.D.H. – 1994;
- [31] Decision nr.75/1997 of the Constitutional Court of Romania, published in the Official Gazette No.258/1997;

- [32] Decision nr.29/2000 of the Constitutional Court of Romania, published in the Official Gazette No.460/2000;
- [33] Decision no.532/2004 of the Constitutional Court of Romania, published in the Official Gazette No.91/2005;
- [34] Decision nr.292/2000 of the Constitutional Court of Romania, published in the Official Gazette No.702/2000;
- [35] Decision nr.62/.1999 of the Constitutional Court of Romania, published in the Official Gazette No.308/1999;
- [36] Decision nr.102/1995 of the Constitutional Court of Romania, published in C.D.H. 1995 – 1996;
- [37] Decision nr.62/.1999 of the Constitutional Court of Romania, published in the Official Gazette No.308/1999;

- [38] Decision nr.102/1995, published in C.D.H. 1995 – 1996.

Legislation

- [1] Romanian Constitution;
- [2] Italian Constitution;
- [3] Constitution of Spain;
- [4] Law no.137/2002;
- [5] Law no. 32/1991;
- [6] The Law on Public Finance no. 10/1991;
- [7] The French Declaration on Human Rights and Citizen (1789);
- [8] The Education Law no. 84/1995;
- [9] Law no. 80/1995, on the Status of Military Staff;
- [10] O.U.G. no.22/2003;
- [11] Law no.543/2002.