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

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## **Abstract**

*An essential dimension of the rule of law is the consecration and guarantee of fundamental rights and freedoms, ensuring the optimal conditions for applying them. State authorities have a negative obligation to refrain from any arbitrary or excessive interference that may limit or condition the exercise of constitutional rights. Any restriction on applying fundamental rights and freedoms by measures ordered by the state authorities must be exceptional and must comply with the conditions imposed by the Constitution but also by the relevant international legal instruments. Based on these premises, this study analyzes the constitutional institution of restricting the exercise of certain rights. It also looks into the main particularities of the principle of proportionality applied when restricting the exercise of certain rights, with references to the jurisprudence of the Constitutional Court and the European Court of Human Rights.*

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### LIMITS, RESTRICTIONS AND DEROGATIONS CONCERNING THE EXERCISE OF FUNDAMENTAL RIGHTS AND FREEDOMS

Liiceanu, a Romanian philosopher, holds that freedom has a meaning provided the limit exists, as to manifest itself it must depend on something, circumscribe itself to certain coordinates.

"Human freedom is construed in a bundle of limits that are the very condition of its exercise." (Liiceanu, 1994: 11)

Consecration and guaranteeing of human rights through domestic and international regulations do not exclude their limiting. Moreover, the existence of such unconditional, theoretical rights cannot be accepted in a democratic constitutional system. The lack of the exercising limits and conditions prescribed by the 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. Thus Article 4 of the French Declaration of Rights of Man and Citizen stipulates that "the exercising of each person'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 highlights that in the relationships among the rights holders "one person's freedom ends where another's begins since the condition inherent to the person is its relationship with others." (Deleanu, 1998: 269-270)

Social order and stability imply tolerance and mutual respect among the subjects participating in 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." (Deleanu, 1998: 205) The difficulty lies in finding the most suitable solutions that would balance individual and public interests while guaranteeing the fundamental rights and freedoms in situations which could limit or restrict their application.

Two extreme attitudes have been outlined in the relationship between rights and freedoms on one hand, and society, on the other hand: the sacrifice of rights and freedoms in the interests of social order or the preeminence of rights and freedoms to the detriment of interests and social order (Deleanu, 1998: 205). None of these solutions is justified by the imperatives of authentic democracy and the requirement to achieve balance and social harmony. Constitutional regulations must strike a balance between citizens and public authorities and

between public authorities and citizens in order to be effective. They must also ensure protection for the individuals against the arbitrary interference of State in the exercise of their rights and freedoms (Muraru, 1999: 16-17). Therefore, the limits imposed on the fundamental rights and freedoms must be appropriate to legitimate purposes such as the protection of society, of the social, economic, and political order, of the lawful order, or the protection of the rights of others. The limits must not alter the contents of the rights themselves but must ensure their exercise thereof in such situations.

The existence of some limits on the exercise of fundamental rights is justified through constitutional protection or protection through important international legal instruments or state human values. However, it is not acceptable that in the name of these values, state authorities discretionarily and abusively limit 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 relies on the appropriate relationship among the measures restricting the exercise of human rights and freedoms, the factual situation, and the legitimate pursued aim. It, thus, represents a criterion for determining these limits, avoiding the excess power but also guaranteeing the constitutional consecrated rights. (Andreescu, 2007)

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

The first distinction is between the limit and limitation of fundamental rights (Micu, 1998: 141). Thus, the limit is a content item of the law and it is necessary for its exercise. In contrast, the limitation (restriction) limits the exercise of a right by measures taken by the competent state authorities because of a legitimate aim.

Deleanu (1998: 205) believes that there are limits imposed on the fundamental rights and freedoms to facilitate their implementation, and also, on the other hand, limits aiming at "the protection of society, its socio-economic and political and legal order" (Deleanu, 1998: 205). The limits deriving from such a purpose may be *absolute or relative*. *Absolute limits* are imposed by the demands of social life in all circumstances for the protection of the essential values of the state and society whereas *relative limits* are 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.

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 exceptional and temporary nature, being measures taken by the state authorities to protect or achieve a legitimate aim.

States interfere in the exercise of the fundamental rights and freedoms 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 the rights and fundamental freedoms in such situations require not only constitutional regulation but also international legal instruments of the conditions justifying the enactment of such measures.

There are constitutions governing the institution of the restriction of certain rights in certain circumstances (art.18 of Portugal Constitution; Art.19, paragraph.1 and 2 of German Constitution and Art.53 of România's Constitution), the possibility of suspending certain rights or freedoms (Art. 55 of Spain Constitution) or in cases that due to the abusive exercising of a right, its exercise is lost (Art.18 of German Constitution).

Romania's Constitution imposes *conditions* on the exercise of certain rights or freedoms. Thus, the freedom of movement is exercised under conditions established by law (Article 25, para. (1)). A physical person may dispose of oneself if they do not violate the rights and freedoms of others, public order or morals (Article 26, para. (2)); a person's right to access information of public interest cannot 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, honour, privacy of a 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 the principle, which refer to the measures taken by state through law or government ordinance that represent interference with the exercise of constitutionally guaranteed rights. Such measures are temporary to avoid affecting the substance of the rights and, also, 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 constitutionally consecrated law. Thus, the exercise of individual freedom may be restrained by search, detention, or arrest (Article 23). Inviolability of home may be restricted under

the terms of Article 27, par. (2). The provisions of Article 36, par. (2) prohibit the right to vote to certain categories of persons. The provisions of Article 40, par. (3) prohibit certain professional categories the right to join political parties.

Restrictions differ from derogations but however, they both cover the exercise of rights and fundamental freedoms.

Restrictions are measures considered needed in a democratic society, inflicted 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 be applied only for the intended purpose."

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

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

According to the international legal instruments, to avoid any arbitrariness derogations must meet the following conditions: they must be applied only in exceptional circumstances; they must be strictly appropriate to the facts; they must be compatible with other obligations that States members adjusted to the international law; they must not be discriminatory; the states that make use of the right of derogation must announce the relevant international fora.

There are also absolutely guaranteed rights (absolute rights) where no restrictions or derogations are allowed, such as the right to life; the right not to be subject to torture, or 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 subject to a condition, restriction, suspension, or exemption. The principle of proportionality, applied to this issue aims at striking a fair balance between individual interests and public interests or private interests, which correspond to the fundamental subjective rights, constitutionally consecrated and guaranteed.

## **PARTICULAR ASPECTS OF PROPORTIONALITY UNDER THE PROVISIONS OF ARTICLE 53 OF THE ROMANIAN CONSTITUTION**

The Romanian constitutional provisions related to the restriction of fundamental rights and freedoms in the literature in the field distinguish between common and special circumstances restricting rights. Thus, common circumstances restrict the exercising of certain rights that form the subject for the regulation of provisions of Article 53 of the Constitution, whereas special circumstances refer to certain rights and freedoms. Common restriction circumstances are of temporal nature and are essentially fortuitous, while special circumstances are permanent (Deleanu, 1998, vol II: 123; Jurisprudence consecrates this difference also. See decision no.13/ 1999 of Constitutional Court, published in the Official Gazette no.178/1999). The quoted author stresses that such circumstances should be expressly recognized as "not being the product of conventionalism" (Deleanu, 1998, vol II: 123).

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

The Romanian 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 (Muraru, Tănăsescu, 2003: 174-176). The issue of interpretation and application of the provisions of Article 53 is particularly complex because these restrictions can refer to 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 apply to all citizens' fundamental rights and freedoms.

In the version before the revision of the Constitution, the provisions of Article 49 indicated that the restraints could be achieved only by law, if necessary, according to the following purposes: "the protection of national security, public order, health or morals, rights and freedoms of citizens, the conduct of a criminal investigation, the prevention of the consequences of a natural disaster, or 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.

The Law amending the Constitution of 18 September 2003 modified the provisions of Article 49 and a new numbering of the Articles, Article 49 becoming Article 53, came with the republication of the Constitution. The initial rules in place for the restriction of exercising some rights were maintained and two more conditions were added: the restriction must be "necessary in a democratic society" and the restrictive measure is applied "non-discriminatorily". In this way, the Romanian Constitution included the most important rules in the international legal instruments in the matter and capitalized C.E.D.O jurisprudence.

Some differences can be found when making a comparative analysis between the Romanian constitutional provisions and those contained in certain international legal instruments governing the conditions for the restriction of exercising certain rights and freedoms. Our study signals that the provisions of Article 53. (2) of the Romanian Constitution expressly consecrates proportionality as a necessary condition in the case of restriction of exercising certain rights, whereas in most international legal instruments this condition results implicitly out of the content of the regulations and it is deduced by way of interpretation, by the jurisprudence of international courts.

Therefore, it is useful to look into some aspects of the doctrine and jurisprudence of the interpretation and application of Article 53 of the Constitution in order to identify the peculiarities of the principle of proportionality applied in this matter.

The recitals of Decision No. 4/1992 of the Constitutional Court (published in the Official Gazette no192/1992.) state that under the assumption that the legal provision subject to 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 the Constitution.

Legal doctrines state that if the legislator restricts the exercise of certain rights without expressly indicating the constitutional background, this "does not remove the obligation of verification within the procedure for monitoring the legitimacy of the constitutional law if the measure thus established constitutes a limitation of a right." (Muraru, 1995: 199.

The Constitutional Court holds that the provisions of Article 53 take into consideration the fundamental rights and freedoms contained in Chapter II, Section I of Constitution, and no other rights. 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, highlights the distinction 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 this case because these provisions apply to deprivation of liberty and not to restriction of freedom." (Decision no 239/2001, published in the Official Gazette no 838/2001)

At the same time, our Constitutional Court decided that the restriction of a right must be temporary, being instituted only for the time when the causes that produced it are acting, which are limitatively consecrated by para (1) of Article 53 of the Constitution. (Decision no 83/1999, published in C.D.H., 1999, p. 582.)

Whenever the restriction of exercising a right is realized to defend the rights of the citizens, restrictive measures are legitimate only in consideration of a particular law, as without this restriction, that right would be affected (Decision no 139/1994, published in C.D.H., 1994, p. 84). The restrictions brought upon the exercising of the right should not alter the substance of this right. The Constitutional Court has established that certain restrictions of ownership can be disposed of through the law, but they should not alter this very right substance. These restrictions can be established as regards the object of the right or other attributes of the law, for the protection of the rights of persons or the general social and economic interests (Decision no19/1993, published in C.D.H., 1992-1993; Decision no147/1997, published in C.D.H., 1998).

The Constitutional Court jurisprudence draws attention to 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 (republished in the Official Gazette no 113/2001) on the legal profession, seek to enforce the right of defense in terms of competence, professional responsibility, and practical experience, related to the hierarchical level of the courts and the complexity of the cases. Thus, 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 the lawyer (Decision no 256/1997, published in the Official Gazette no 134/1998).

Also, the exemption by the law of certain categories of citizens from 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 the Constitution are not applicable. (Decision no 115/1999, published in the Official Gazette no 522/1999)

Proportionality is a condition of the constitutionality of the measures ordered by law or

by ordinances, through which the exercise of some fundamental rights and freedoms are restricted, a condition expressly stipulated by provisions of Article 53, par. (2) of the Constitution. The analysis of the particularities of this principle must be carried out systematically in the context of Article 53. Express consecration of a particular aspect of the principle of proportionality, through the provisions of Article 53, par. (2) changes the proportionality, from a rule of moral or opportunity into a constitutionality condition of the law, 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 exercising those rights and freedoms, justified by achieving a legitimate aim. To avoid arbitrariness or excess of power by state authorities that adopt such measures, the state must provide the necessary guarantees adequate to the constitutionally pursued purpose, 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 the constitutional court to sanction the arbitrary interferences of Parliament or Government in exercising the rights. (Muraru, 1999: 22-23)

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

The legal doctrine points out that whenever the legislator brings a limitation on the exercise of a right or freedom, he should expressly state the provision under the constitutional Article 53 in that disposition (Muraru, 1999: 200-201). This statement aims implicitly at respecting the principle of proportionality and corresponds to the principle of supremacy of the Constitution: "The law is an enactment act, in the sense that the legislator's will necessarily finds limits in the supremacy of the Constitution, as a fundamental law of the state and society." (Muraru, 1999: 201) In such cases, the assessment made by the legislator or the constitutional judge is based on proportional reasoning. The restriction of exercising certain rights is justified by the existence of diverse and, in some cases, even contradictory interests: 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 comparison of interests so that limiting 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 purposes justifying the restriction of certain rights and which help assess whether the principle of proportionality is being met are expressly and limitatively provided by Article 53, par. (1) of the Constitution. Their meaning is important to determine the proportionality of restrictive measures.

The principle of proportionality, applicable in terms of restriction of certain rights, is concretely determined by the meaning of the elements being compared, pending on which to establish whether the respective measure is either appropriate or not to the situation and intended purpose. Proportionality of the restrictive measures must be assessed in terms of 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 a legitimate aim. (See Decision no 139/1994 published in the Official Gazette. No 353/1994, Decision no75/1994, published in the Official Gazette. No 190/1994 and Decision no 21/2000, published in the Official Gazette. No 159/2000).

Thus, "national security", a newly introduced expression following the revision of the Constitution, which replaces the term "national safety", 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 state, supporting the maintenance of public order and the climate for the unrestrained exercise of rights, freedoms and fundamental duties of citizens, according to democratic principles and norms established by the Constitution." (Art.1 of Law no 51/1991 regarding the national safety of Romania, published in the Official Gazette No 163/1991)

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

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

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

Ensuring the respect of citizens' "rights and freedoms" is a requirement mainly since the person

belongs to a social community, implying the fact that the rights and freedoms of others require as much protection as their rights and freedoms.

"Criminal Instruction" is a component of the lawful order and implies the succession of acts and deeds that present the criminal proceedings in all its phases and stages. (Deleanu, 1998, vol II: 121-122) Depending on the legitimate aim pursued the "margin of appreciation" is determined, where the public authorities have to impose limitations on the exercise of fundamental rights and freedoms, as provided by Article 53 of the Constitution. The limits of the right of appreciation of the competent state authorities and also the respect for the principle of proportionality are established in our constitutional jurisprudence court, including by reference to the E.C.H.R. 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 the E.C.H.R. jurisprudence; the restrictive measures are proportionate to the legitimate aim pursued if the national and institutional legislative system has adequate and sufficient guarantees against abuses (See Case Leander versus Sweden, 1999). There is a distinction between facts and value judgments. If the materiality of the first one can be proved, the value judgments cannot be demonstrated in terms of their accuracy (Case Lingens versus Austria, 2002). Therefore, the compliance with the condition for the proportionality of the restrictive measures imposed on the freedom of expression is appreciated differently depending on the nature of allegations. The proportionality can be regarded as a strict fitness into 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 (Case Wingrove versus the United Kingdom, 2001).

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

The jurisprudence of the Constitutional Court of Romania contributed to identifying the features of the proportionality principle applied in relation to guaranteeing the fundamental rights and freedoms, including 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; this has 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, subject to a limit or circumstance. The existence of some limits or conditions for the exercise of some fundamental rights is justified by the constitutional protection of some important human or state values.

In line with the above-mentioned statements, Romania's Constitutional Court holds: "The legislation, doctrine, and jurisprudence have rejected and constantly reject the existence of absolute rights and liberties." Given this premise, the court identifies the Romanian constitutional provisions that set limits, conditions, or restrictions in exercising some rights. (Decision no 13/1999, published in Official Gazette. no 178/1999)

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 terms of the protection of fundamental rights and freedoms. The general principle of proportionality expresses the need for a proper balance. 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 the 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 certain rights are restricted. The Constitutional Court assumes this jurisdiction only if the proportionality is a condition of the constitutionality of the law instituting the restriction of the right. "Unquestionably, the checking of proportionality is within the competence of the Court, while the proportionality of restriction during the situation that caused it is a constitutionality prerequisite of the law that established the restriction of the right" (Recital no 3 of Decision no71/1996, published in the Official Gazette. No 131/1996).

These findings of the Constitutional Court are important for several reasons: 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 it is a *legal* requirement within the Court's controlling jurisdiction. The

Court makes a distinction between the general principle of proportionality, the proportionality applied to other branches of law, and the constitutional principle of proportionality applicable to the restriction of certain rights. The competence of the Constitutional Court refers only to the constitutional principle of proportionality, consecrated by Article 53 para (2) provisions. The interpretation of our Constitutional Court of the content of the principle of proportionality applied in this matter is worth mentioning: the appropriateness of the restriction to the situation that caused it.

The Constitutional Court points out that proportionality must be analyzed and understood according to the legitimate purpose of the restricting measure. This purpose has to be stipulated in the limiting set of Article 53, par. (1). Moreover, the reference to the legitimate aim must not be generic; it has to be specific about the law through which the restriction of exercising a right is ordered in order to respect the principle of proportionality. Analyzing the restriction 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 according to 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 necessary extent, so that this right is not at least partly compromised ... or, in the absence of specifying in whose service the restriction takes place, the simple reference to the social protection right (Article 1 of the Ordinance) or to existing social rights (Article 7 of the Ordinance) does not mean neither that this restriction is imposed - as required by Article 53 of the Constitution - nor that it is proportional to the situation that caused it - as required by paragraph 2 of the same Article" (Recital no16 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.)

The reasoning behind the argumentation of proportionality, which in terms of the restriction of certain rights, involves the adequacy of the restrictive measure to the situation and also to the legitimate aim pursued, is used in the jurisprudence of the Constitutional Court. Analyzing the respecting of the 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 the principle of proportionality is satisfied, taking into consideration both the provisions of Article 18 of the Convention and the provisions of Article 53, par. (2) of the

Constitution. It was found that the preventive arrest measure is necessary for conducting a criminal investigation and proportional to the situation that caused it (Decision no 26/2000, published in the Official Gazette no 232/2000).

In the jurisprudence of the Constitutional Court, the argumentation of proportionality is revealed under the form of the analysis of a fair balance that should exist between two constitutionally protected rights, a balance that determines simultaneously the limits of exercising them. (Decision no 57/1998, published in the Official Gazette no 167/1998; Decision no 110/1995, published in the Official Gazette no 74/1996).

The Constitutional Court states that the principle of proportionality, under Article 53, par. (2) of the Constitution, has the rights and fundamental freedoms as the only objective (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). In this regard, the Constitutional Court holds 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 the Constitution. "It is undeniable that the verification of proportionality belongs to the controlling powers of the Court, as long as the only objective of the restriction is the exercise of certain fundamental rights or freedoms. (Decision no 25/1999, published in the Official Gazette no 3/1999. See Decision no 13/1999 previously quoted, by which the Constitutional Court states that in the present case, the principle of proportionality is not applied as stipulated by Art.53 of the Constitution since the right to hunger strike is a fundamental right protected by constitutional norms).

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

The jurisprudence of our Constitutional Court, as far as the interpretation and application of the principle of equality are concerned, has evolved from admitting that different situations must be treated differently up to recognizing new constitutional rights, such as "the right to difference".

Uniformity has been consistently rejected in the jurisprudence of the Constitutional Court, in connection to the interpretation and application of the principle of equality. Each situation is unique and must benefit from a different treatment. The principle of proportionality means, in this case, the required adequacy of legal regulation to the objective situation considered. Also, proportionality requires the existence of an "objective and reasonable" motivation 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 depend on the purpose aimed. Accordingly, a different treatment may not be only the exclusive expression of appreciation of the judge, but must be rationally justified, by observing the principle of equality of citizens before the law and public authorities." (Recital no 5 of the Decision of Constitutional Court Plenum no 1/1994, published in the Official Gazette. No 69/1994. Also, see Decision no 85/27th July 1994, published in C.D.H./1994, pg. 68-74).

Applying the reasoning of proportionality, the Constitutional Court has reached the recognition of a fundamental right: "the right to difference". "Generally, it is estimated that the violation of the principle of equality and non-discrimination takes place when applying a differential treatment to equal cases, without an objective and reasonable motivation or if there is a disproportion between the aimed purpose by unequal treatment and the 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 since equality is not natural imposing it would mean to establish discrimination. (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).

## 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 as a guarantee to human rights by the E.C.H.R.

However, the jurisprudence of our Constitutional Court is neither generous nor edifying in the application and interpretation of the principle of proportionality in ensuring the fundamental rights and freedoms; this demonstrates that proportionality, as a principle of the law in general and the constitutional law in particular, does not represent another object of the major concern of jurisprudence.

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

Constitutional Court which 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, present serious difficulties, given the diversity of concrete situations, the appreciation margin recognized by the legislator, the nature of the protected right and, last but not least, the interpretative reasoning of the Constitutional Court, which must be maintained at a high level of abstraction, setting the constitutionality of a provision by relating it to the provisions of Constitution.

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

- a) the necessary appropriateness of constitutional and legal guarantees conferred to fundamental rights and freedoms to the pursued finality, namely the protection of the exercise of rights in concrete situations when they could be restricted;
- b) the adequate relationship between the restrictive measures ordered by the law, the situation in fact and the legitimate aim pursued, in accordance with Article 53 of the Constitution;
- c) the "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 constitutionally protected rights and interests.

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