

STATE POWER AND THE RESTRICTION OF THE EXERCISE OF CERTAIN RIGHTS OR FREEDOMS

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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 has 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 fulfil all conditions stipulated by item 53 of the 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 is legitimate. The main particularities of the principle of proportionality applied in the matter of restraining the exercise of certain rights are analyzed with reference to the jurisprudence of the Constitutional Court and the European Court of Human Rights.

Keywords: *state of law, fundamental rights and freedoms, restriction of the exercise of the fundamental rights, principle of proportionality, constitutional requirements.*

1. LIMITATIONS, RESTRICTIONS AND DEROGATIONS REGARDING THE EXERCISE OF RIGHTS AND FUNDAMENTAL FREEDOMS

A Romanian author underlined the fact that freedom has meaning only under the conditions of the limit's existence, because in order to manifest itself it must depend on something, to be circumscribed to certain coordinates. "Freedom shall be interpreted between boundaries which are the very condition of its exercise" [1].

Stating and guaranteeing the human rights by national and international regulations does not exclude the possibility of their limitation. Also, the existence of certain unconditioned rights theoretically cannot be accepted in a democratic constitutional system. The absence of the limitations and the conditions for the exercise stated by the laws, constitutions or international legal instruments may lead to arbitrary or abuse of right, because it would not allow the differentiation of the legal behaviour from

the illegal one. This idea is being expressed by Art 4 of the French Declaration of the Rights of Man and Citizen: "...the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights". Also, the legal doctrine has mentioned that within the relations between the owners of rights "one man's freedom ends where another's starts, because the condition inherent for the person is the relation with others" [2].

The order and social stability refer to mutual tolerance and respect between the subjects involved in social relations. The performance of the rights and fundamental freedoms must be contradictory to the order already existing in the social life: the coexistence of the freedoms and the social protection are the two commandments founding the limitations edited by the positive law [3]. The difficulty consists in finding the most appropriate solutions which will harmonize the individual interests with the public interest also guaranteeing the rights and fundamental freedoms in the cases in which their exercise could be limited or restrained.

In the relation between the rights and freedoms on one side, and the society on the other side, two extreme attitudes have been shaped: the scarification of the rights and freedoms for the interest of the social order, or the pre-eminence of the rights and freedoms, even if are sacrificed the social order and interests [4]. None of these solutions is justified by the imperatives of a true democracy and the requirement of achieving the social balance and harmony. The constitutional regulations, in order to be efficient, must achieve a balance between the citizens and the public authorities, then between the public authorities and of course, the citizens. It must also insure protection for the individual against the arbitrary interferences of the state in performing his rights and freedoms [5]. This is why the limits imposed for the rights and fundamental freedoms must be adequate to a legitimate purpose, which may be: the protection of society, of the social, economic and political order, of the rule of law or for the protection of the other individuals' rights. The limitations must not empty of content the rights itself, but must guarantee their performance under such situations.

The existence of limits for the performance of certain fundamental rights is justified by the constitutional protection or by the protection offered by certain international legal instruments to specified human or state values. Nevertheless, it is not admissible that in

the name of such values the state authorities to be discretionary and abusive in limiting the performance of the rights who are guaranteed by the Constitution. In this case, the destruction of democracy under the pretext of its defence could be achieved.

The principle of proportionality, seen as relation appropriate between the measures limiting the exercise of the human rights and freedoms, the current situation and the legitimate purpose aimed represent a criterion for the determination of these limits, the avoidance of the excessive power, but also a guarantee of the constitutional guaranteed rights [6].

In doctrine, the legal instruments and the jurisprudence, the limits of the rights and fundamental freedoms have been differentiated according to several criteria. A first differentiation is that between the limit and the limitation of the fundamental rights [7]. Thus, the limit is an element of content of the right and is necessary for its performance. Unlike it, the limitation (restriction) restricts the exercise of a right by measures ordered by the competent state authorities for a legitimate purpose. Another author [8] considers that the limits are imposed to the rights and fundamental freedoms in order to ease their performance and, on the other hand, the limits have as purpose “the protection of the society, of its socio-economic and political order, as well as of the rule of law” [9]. The limits deriving from such a purpose may be absolute, imposed by the exigencies of the social life, in all cases for the protection of the essential values of the state and society, and on the other hand relative, namely those who are not applied in a general and permanent manner, but either to certain of the rights and freedoms, or in a certain period of time or determined situation, or to certain subjects [10].

In our opinion we can distinguish: a) conditions for performance of the rights and freedoms found in their very legal content and constitutional definition; b) restrictions, derogations, suspensions, the loss of the right, which have an exception and temporary, being measures ordered by the state authorities for the protection or achievement of a legitimate purpose. The interference of the state in the performance of certain rights and fundamental freedoms could be achieved mainly by the restriction and suspension of the exercise of certain rights or by derogations. These means are also stated by the constitutions and international legal instruments. The avoidance of any abuse of the state authorities and the guarantee of the rights and fundamental freedoms in such cases

impose the constitutional statement, also in international legal instruments of the conditions justifying the application of such measures.

There are constitutions stating the institution of the limitation of the exercise of certain rights in certain cases [11], the possibility for suspending certain rights or freedoms [12] or the cases in which because of the abusive exercise of a right its performance shall be lost [13]. The Romanian Constitution states conditions on the exercise of certain rights or freedoms. Thus, the freedom of movement shall be exercised under the conditions established by the law (Art 25, Para 1). Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals (Art 26 Para 2); the right to information shall not be prejudicial to the measures of protection of young people or national security (Art 31 Para 3); the law shall regulate the conditions and limits governing the exercise of this right, as well as the guarantees necessary to ensure the essential services for the society (Art 43 Para 2); the right of property, as well as the debts incurring on the State are guaranteed. The content and limitations of these rights shall be established by law (Art 44 Para 1); freedom of expression shall not be prejudicial to the dignity, honour, privacy of a person, and to the right to one's own image (Art 30 Para 6); public meetings, processions, demonstrations or any other assembly shall be free and may be organized and held only peacefully, without arms of any kind whatsoever (Art 39).

The limitation of the exercise of certain rights or freedom is stated by Art 53 of the Constitution. These are provisions of principle, which refer to the measures ordered by the law or government ordinances, representing interferences in the performance of the rights guaranteed by constitution. In order to not endanger the substance of the right, these measures shall be temporary and, also may be constitutional, having to cumulatively compel with the conditions stated by Art 53. Also, there are constitutional provisions limiting certain rights, these limitations having a permanent feature. The restrictions usually are specific to the legal content of the right constitutionally stated. Thus, the exercise of the individual freedom could be limited by search, detainment, or arrest (Art 23). The domicile and the residence are inviolable, with limitations stated by Art 27 Para 2. Art 36 Para 2 prohibits certain categories of persons from voting. Art 40 Para 3 prohibits certain professional categories from joining political parties.

There are differences between limitations, and on the other hand derogations aiming the performance of the rights and fundamental freedoms. The limitations are measures considered necessary in a democratic society, applied for the purpose of achieving a public interest or to protect the rights and freedoms of other individuals. In this meaning, Art 18 of the Convention states that: “the restrictions ... shall not be applied for any purpose other than those for which they have been prescribed”.

With all the particular aspects, resulted from the Constitution or from international legal instruments, common conditions can be identified for the legitimacy of the restrictions: to be stated by the law, to be necessary in a democratic society, to not be discriminatory, to be appropriate for at least one of the purposes expressly stated by the law, as well as to the situation justifying them. These conditions must be cumulatively fulfilled. Thus, the fundamental rights are being guaranteed and it is removed the arbitrary interference of the state’s authority in their performance.

The derogations are more complex limitations of the rights and fundamental freedoms and may be ordered by the states in exceptional cases. The limitations may aim, mainly, any fundamental right, unlike the derogative measures whose object shall refer only to certain human rights, guaranteed by international legal instruments. From the international legal instruments in this area it results that the derogations, in order to stop being arbitrary, must fulfil the following conditions: to be applied only for exceptional cases, to be strictly adequate to the situation, to be compatible with the other obligations that the state parties have according to the international public law, to not be discriminatory, the states using the right to derogation shall notify the international competent forums.

There are also rights guaranteed absolutely (absolute rights) in the meaning that no limitations or derogations shall be accepted. Obviously we refer to the right to life, the right to not be subjected to torture, to any form of punishment or inhuman treatment. The principle of proportionality represents a guarantee for all situations in which the performance of a right or fundamental freedom is subjected to a condition, limitation, suspension or derogation. The principle of proportionality, applied in this matter, considers the achievement of a fair balance between the individual interests and the

public interest or between different private interests corresponding to certain fundamental subjective rights, stated and guaranteed by the Constitution.

2. THE DELIMITATION OF THE DISCRETIONARY POWER FROM THE EXCESS OF POWER IN THE ACTIVITY OF THE PUBLIC ADMINISTRATION

The essential issue remains the one stated in the beginning of this section, namely to identify criteria which shall establish the limits of the discretionary power of the state authorities and its differentiation from the excess of power, which shall be sanctioned. Of course, there is the problem of the use of these criteria in the practice of the courts or of the constitutional contentious courts.

Regarding these aspects, in literature was expressed the opinion according to which “the purpose of the law shall be the legal limit of appreciation (of opportunity). For the discretionary power is not freedom outside the law, but allowed by the law” [14]. Of course, “the purpose of the law” represents a condition for legality or, where appropriate, for the constitutionality of the legal acts of the state organs and this can be considered as a criterion for delimiting the discretionary power from the excess of power.

As resulted from the jurisprudence of international and domestic courts, in relation with our subject of research, the purpose of the law cannot be the sole criterion for the delimitation of the discretionary power (synonymous with the margin of appreciation, term used by the ECHR), because a legal act of the state can represent excess of power only if the measures adopted do not aim a legitimate purpose, but also if the measures ordered are not adequate to the purpose of the law and are not necessary in relation to the real situation and the legitimate purpose aimed. The appropriateness of the measures ordered by the state authorities to the legitimate aims pursued is a particular aspect of the principle of proportionality. Of significance is the opinion of Antonie Iorgovan, who considers that the limits of the discretionary power are established “by the written positive rules, the general principles of law, the principle of equality, the principle of non-retroactivity of the administrative acts, the right to defence and the principle of contradictory, the principle of proportionality” (s.n) [15]. Therefore, the principle of proportionality is an essential criterion allowing the delimitation of the discretionary power from the excess of power in the activity of the state authorities.

This principle is expressly or implicitly stated by international legal instruments [16] or by most of the democratic states' constitutions [17]. The Romanian Constitution expressly states this principle in Art 53, but there are other constitutional provisions implying it. In the constitutional law, the principle of proportionality is applied especially in the area of the protection of the human rights and fundamental freedoms. It is considered as an efficient criterion of appreciation of the legitimacy of the intervention of the state authorities in the case of limiting the exercise of certain rights. Moreover, even if the principle of proportionality is not expressly stated by a constitution, the doctrine and jurisprudence shall consider it as part of the notion of state of law [18].

The principle of proportionality is applied in different areas of law. Thus, in the administrative law it is a limit of the discretionary power of the public authorities and represents a criterion for the exercise of the jurisdictional control of the discretionary administrative acts [19]. There are other applications of the principle of proportionality in the criminal or civil law. The principle of proportionality can also be found in the community law, in the meaning that the legality of the communitarian rules is subjected to the condition that the means used be in accordance with the aimed objective and must not overcome what is necessary for the achievement of that objective.

The jurisprudence has an important role in the analysis of the principle of proportionality, applied to specific cases. Thus, in the jurisprudence of the ECHR, the proportionality is seen as a fair and balanced relation, between the issue in fact, the means for restricting the exercise of certain rights and the legitimate purpose aimed or as a fair relation between the individual interest and the public one. The proportionality is a criterion determining the legitimacy of the interference of the contracting states in the exercise of the rights protected by the Convention. In the same meaning, the Romanian Constitutional Court, through several decisions, has established that the proportionality is a constitutional principle [20]. Our constitutional court has stated the need of establishing objective criteria, using the law, for the principle of proportionality: "it is necessary for the legislator to state objective criteria reflecting the exigencies of the principle of proportionality" [21]. Therefore, the principle of proportionality imposes itself more and more as a universal principle, stated by most contemporary legal systems, explicitly or

implicitly found in constitutional norms and recognized by the national and international jurisdictions [22].

The proportionality is not only a matter of fact, but represents a principle of the law, including of the constitutional law, and the courts of common law, of administrative contentious or the Constitutional Court may invoke to sanction the excess of power. Our constitutional court may explicitly invoke the criterion of proportionality, only under the conditions stated by Art 53 Para 2 of the Constitution. Therefore, there is no possibility to sanction the excess of power of the legislator, using the criterion of the proportionality, especially for the cases in which, though the measures used the legislator overcomes what is necessary for the achievement of a legitimate purpose.

Regarding the jurisprudence in this area of some courts from other states it is important to mention the French Council of State has established since 1950 that the appeal for excess of power should be considered as being the appeal submitted even in the absence of a legal text, by invoking the general principles of law, including the principle of proportionality [23]. Starting from the ascertainment that the proportionality is a general principle of law, the courts may invoke it, even if it is not explicitly stated by a legal text because “the violation of the principle of proportionality is nothing else than the overcoming of the freedom of action left at the disposal of the authority and finally, the excess of power” [24].

The literature has identified three levels of jurisdictional control for the administrative acts: “a) the minimum control of the rule of procedure (form); b) the normal control of the legal appreciation of the actions; c) the maximal control, when the judge rules upon the necessity and proportionality of the administrative measures” [25]. The maximal control, to which the quoted author refers to, represents the correlation between legality and opportunity, in other words, between the exigencies of the principle of legality and of the right of appreciation of the public authorities, the proportionality not being considered as a criterion of super-legality, but as a principle of law whose main purpose being the discretionary power and the excess of power in the activity of the public authorities.

We have previously shown that the principle of proportionality can be implicitly identified in different provisions of the Romanian Constitution. We are wondering if our

court for constitutional control could invoke the proportionality, for the cases in which this principle results from the constitutional provisions, as general principle of the law. We consider that the answer is affirmative, though the attempts in this area are still shy, probably because of the absence of a modern theory of the principle of proportionality in law, but we need to note that there are situations in which the Constitutional Court has used a “proportionality reasoning” as instrument of interpretation of the correlation between the appealed legal provisions and the constitutional provisions, and for the cases in which the proportionality, as principle, is not expressly stated by the constitutional texts. There are two aspects in this respect: the invoking in the jurisprudence of the Constitutional Court of the ECHR jurisprudence which, in the area of limiting the exercise of certain rights analyses the condition for proportionality and the second aspect, the use of this principle in the cases in which it is raised the issue of complying with the principle of equality.

Paradoxically, the use of the criterion of proportionality could represent an excess of power, in the absence of certain procedural elements of determination. The main danger in this case is the correct dimension of the principle. Though, using the procedural criteria with the meaning resulted from the jurisprudence of the international courts, the Romanian judge, including the constitutional one, may offer an objective dimension of the proportionality and a reasoning when he is using this principle. Nevertheless, in the jurisprudence of our constitutional court, there is a small number of decisions analysing the proportionality as principle, even when Art 53 Para 2 of the Constitution is being invoked.

The current law of administrative contentious, which expressly states the sanctioning of the excess of power, shall allow without any doubt the specialized courts to apply the principle of proportionality thus contributing to its explaining and understanding.

To be noticed is that in the jurisprudence of the Constitutional Court, though is not analysed the concept of excess of power, there are situations in which the principle of proportionality is applied (or a reasoning of proportionality), precisely to ascertain if the provisions stated by the laws or governmental ordinances, limiting the exercise of certain rights, are appropriate with the legitimate purpose and the issue in fact. The ruling as

unconstitutional of a normative provision on the reason of non-complying with the principle of proportionality, applied in this matter, signifies the sanctioning of the excess of power manifested in the activity of the Parliament or the Government. Also, excess of power, sanctioned by the Constitutional Court, using the criterion of proportionality, are the situations in which the principle of equality and non-discrimination is violated, if by the law or the governmental ordinance is applied a different treatment for identical cases, without any reasonable justification or if there is a disproportion between the purpose aimed by unequal treatment and the means used.

Two are the most important purposes of the constitutional principle of proportionality: the control and the limitation of the discretionary power of the public authorities and the guaranteeing of the rights and fundamental freedoms in cases in which their exercise could be conditioned or restricted. The proportionality is a constitutional principle, but in most cases there is no express normative stipulation, the principle being deducted through different means of interpretation of the legal texts. This situation creates difficulties in the application of the principle of proportionality. Also, it must be underlined the importance of this principle as criterion for legitimacy for the exercise of the state power, within the limits of the margin of appreciation, according to the legal and constitutional competences.

In relation to these considerations we propose, in the perspective of a new constitutional revision, that Art 1 which has the marginal title "Romanian State", to receive a new paragraph stating that: "The exercise of the state power must be proportionate and non-discriminatory".

In this way, several requirements shall receive an answer:

- a) The proportionality is expressly stated as general constitutional principle and only with limited application for the limitation of the exercise of the rights and fundamental freedoms, as it would be considered nowadays, given the Art 53 of the Constitution;
- b) This new constitutional provision corresponds to similar regulations stated by the "Treaty establishing the European Economic Community" or in the draft project of the "Treaty establishing a Constitution for Europe", which is important from the perspective of the Romanian adhesion to the European Union;

- c) This new regulation would represent a true constitutional obligation, for all state authorities to perform their attributions so that the measures adopted by within the limits of the discretionary power recognized by the law and to not represent an excess of power;
- d) It is created the possibility for the Constitutional Court to sanction, using the control for constitutionality of the laws and ordinances, the excess of power in the activity of the Parliament and Government, using as criterion the principle of proportionality;
- e) The correlation between the principle of proportionality and the principle of equality is better achieved.

3. ASPECTS OF JURISPRUDENCE REGARDING THE APPLICATION OF ART 53 OF THE CONSTITUTION

Regarding the Romanian constitutional provisions on the limitation of the exercise of the rights and fundamental freedoms, the literature has made the distinction between the common circumstances for the limitation of the exercise of certain rights representing the object of Art 53 of the Constitution, and on the other hand the special circumstances, specific to certain rights and freedoms. The common circumstances for limitation have a temporary feature and are fortuitous, while the special circumstances have a permanent feature [26]. The quoted author underlines that these circumstances must be expressly stated “not being the product of conventionality” [27].

Though these circumstances are common, they may justify the limitation considering the nature of the right or freedom. Thus, no circumstance can justify the limitation of the right to life or of the right to not be subjected to torture.

The Romanian Constitution uses a simple and effective procedure for the regulation of the limitation of certain rights and freedoms (common circumstances), through the provisions of a single article. Art 53 allows the limitation of certain rights and fundamental freedoms, but only under certain conditions [28]. The issuing of interpreting and applying Art 53 has a special complexity because the limitations may aim the exercise of any right or fundamental freedom stated and guaranteed by the Constitution, except those considered as absolute. The complexity is due to the diversity of the specific situations justifying the limitation of certain rights.

The rules established by the Art 53 have the value of a constitutional principle, because are applicable to all human rights and fundamental freedoms. In the wording previous the constitutional revision, Art 49 stated that the limitations may be imposed only by the law, if necessary, considering the following purposes: “protecting the national security, order, health or public morals, of the citizens’ rights and freedoms, the performance of the criminal instruction, preventing the consequences of a natural disaster or of a particularly serious sinister”. In the same time, the limitation must not affect the existence of the right or freedom and be proportionate with the situation which determined it.

For a comparative analysis between the Romanian constitutional provisions and the ones stated by international legal instruments, stating the conditions for the limitation of the exercise of certain rights and freedoms, certain differences may be identified. Of interest for our study is the fact that Art 53 Para 2 of the Constitution expressly states the proportionality as a condition which must be fulfilled in case of the limitation of certain rights, while in most international legal instruments this condition results from the content of the regulations and is deduced, through interpretation, by the jurisprudence of the international courts.

In order to identify the particularities of the principle of proportionality, applied in this matter, some doctrinal and jurisprudential aspects on the interpretation and application of Art 53 of the Constitution must be emphasized.

The doctrine has mentioned the fact that, for the case in which the legislator limits the exercise of certain rights, without expressly indicating the constitutional grounds, it “shall not remove the obligation of verifying during the procedure for the control of the constitutional legitimacy of the law, if the measure thus established represents a limitation of a right” [29]. From the Decision No 4/1992 of the Constitutional Court results from the hypothesis in which the legal provision subjected to control represents a limitation of a constitutional right, being legitimate only for the cases corresponding to the limitative situations expressly stated by Art 53 of the Constitution.

The Constitutional Court has stated that Art 53 considers the rights and fundamental freedoms enlisted by Chapter II, Title I of the Constitution and no other rights [31]. Our constitutional court, by interpreting Art 53 in relation to Art 5 of the European

Convention on human rights and fundamental freedoms has made the distinction between the loss and limitation of a right. The final situation is taken into consideration by Art 53. "The Court ascertained that the invoking of Art 5 of the ECHR does not have incidence in this case, because these provisions are applied strictly to the deprivation of freedom, and not to its limitation" [32].

Also, our constitutional court has decided that the limitation of the exercise of a right must be temporary, being ordered only for a period in which the causes generating it shall action and which are limitedly stated by Art 53 Para 1 of the Constitution [33].

For the situation in which the limitation of a right is ordered for the protection of certain rights of the citizens, the restrictive measures shall be legitimate only in considering a certain right, because without this limitation the concerned right would be affected [34]. The limitations brought to the exercise of the right must not endanger the substance of this right. Thus, the Constitutional Court has established that the law may order certain limitations for the right to property, but they shall not harm the substance of this right. These limitations may be established regarding the object of the right or certain attributes of the right, for the protection of other human rights or general social and economic interests [35].

The jurisprudence of the Constitutional Court differentiates the limitation of the exercise of some rights from the circumstances in which the legislator conditions the exercise of a right. In this meaning has been decided that the requirements for seniority established by Art 19 of the Law No 51/1995 [36] for the organization and practice of the lawyer's profession, aim to insure the exercise of the right to defence under conditions of competence, professional liability and experience, related to the hierarchy of the courts and the complexity of the case files, thus it is natural for them to involve certain conditions, which cannot be seen as a limitation of the right to work, but as a protection both of the interests of the justice seeker, as well as of the lawyer's [37]. Also, the exemption by law of certain categories of citizens from the benefit of rights granted to other persons, who are found in different situations, does not represent a limitation of the exercise of these rights. Therefore, shall not be applicable the provisions of Art 53 of the Constitution [38].

The proportionality is a condition for constitutionality of the measures ordered by the law or by ordinances, which limit the exercise of certain rights and fundamental

freedoms, condition expressly stated by Art 53 Para 2 of the Constitution. The analysis of the particularities of this principle must be systematic performed, in the context of Art 53. The express statement of this particular aspect of the principle of proportionality, by Art 53 Para 2 transforms the proportionality from a moral or an opportunistic rule in a condition for constitutionality of the law, and the constitutional court has the competence to verify the compliance with this principle.

The limitation of the exercise of certain rights or fundamental freedoms, by the law, represents a requirement of the state in the performance of these rights and freedoms, justified by the fulfilment of a legitimate purpose. In order to avoid the arbitrary or the excess of power from the state authorities which adopt such measures, it is necessary to have guarantees insured by the state, appropriate to the constitutional finality aimed, namely the protection of the rights and fundamental freedoms, for the specific situations in which they could be harmed. The principle of proportionality is such a constitutional guarantee allowing the sanctioning by the constitutional court of the arbitrary interferences of the Parliament or Government in the exercise of these rights [39].

Therefore, the measures adopted by the state which limit the exercise of certain rights or fundamental freedoms, in order to not be abusive must not only be legal, namely stated by the law, or by a normative act equivalent as legal force with the law, but also legitimate (fair), namely necessary in a democratic state, non-discriminatory, proportional with the situation determining it and shall not affect the substance of the right. The proportionality and necessity in a democratic society are criteria of appreciation, both for the legislator, as well as for the judge, of the legitimacy of the limitation of the exercise of certain rights and fundamental freedoms.

The doctrine has emphasized that each time the legislator orders a limitation for the exercise of a right or freedom, shall expressly state, in the content of that provision, the constitutional ground of Art 53 [40]. This mention aims the compliance with the principle of proportionality and corresponds with the principle of the supremacy of the Constitution: "The law is an act of application, in the meaning that the will of the legislator founds its limits in the supremacy of the Constitution, as fundamental law of the state and society" [41]. In such cases, the appreciation made by the legislator or the constitutional judge, is based on a reasoning of proportionality. The limitation of the exercise of certain

rights is justified by the existence of different interests, for some cases even contradictory ones. On the other hand, the subjective interest of the owners of the fundamental rights, and on the other hand the public interest or the need to guarantee the fundamental rights belonging to other persons. In such conditions, one of the interests grounds its constitutional legitimacy on a provision and the other one on another constitutional provision. The reasoning of proportionality refers to the comparison of interests, in such way that the limitation of the exercise of a right or fundamental freedom shall not overcome what is necessary for the satisfaction of a public interest or the defence of the other persons' rights.

The principle of proportionality, applied in the area of the limitation of the exercise of certain rights, is specifically determined by the significance of the elements which are compared, depending on which can be established if the measure is appropriate or not with the aimed situation and purpose. The proportionality of the restrictive measures shall be considered in relation to a well determined legitimate purpose, whose meaning is given by the doctrine, law or jurisprudence. The restrictive measure shall not comply with the condition for proportionality, if the purpose for which it has been ordered is general, and a certain right or fundamental freedom is not mentioned as legitimate purpose [42].

The purposes justifying the limitation of the exercise of certain rights and in relation to which is appreciated the principle of proportionality are expressly and limitedly stated by Art 53 Para 1 of the Constitution. Their meaning is important in order to determine the proportionality of the restrictive measures. Thus, the "national security", term inserted as effect of the constitutional revision, which replaces the term of "national safety", refers to "a state of social, economic and political legality, equilibrium and stability that is necessary to the existence and development of the Romanian national state - a sovereign, unitary, independent and indivisible state, to the maintenance of legal order as well as of the climate for the unhampered exercise of the fundamental rights, freedoms and duties of the citizens, in accordance with the democratic principles and rules provided by the Constitution" [43]. "Public order" is the ensemble of the rules insuring the safety of society, the public welfare, social harmony and respect for the law and for the legitimate decisions of the public authorities. "Public morals" represents the ensemble of the perceptions of conduct, dependent on the individual's conscience and the values of his group.

Guaranteeing the compliance with the “rights and freedoms” of the citizens is a requirement imposed by the fact that the person belongs to a social collectivity, which refers also to the fact that the rights and freedoms of the others require the same protection as his own rights and freedoms. The “criminal instruction” is a component of the state of law and signifies the succession of the acts and facts forming the criminal trial in all its phases [44].

Depending on the legitimate purpose aimed it shall be determined the “margin of appreciation” that the public authorities have in order to impose the limits of the exercise of the rights and fundamental freedoms, according to Art 53 of the Constitution. The limits of the margin of appreciation of the competent state authorities and also the compliance with the principle of proportionality shall be established in the jurisprudence of our constitutional court, including by relation to the ECHR jurisprudence. Thus, the proportionality of the state authorities’ interferences is analysed by the international court in relation to the requirements of a democratic society, concept found in the jurisprudence of the Constitutional Court.

Our constitutional court also has invoked other aspects from the ECHR’s jurisprudence: the restrictive measures are proportionate with the legitimate purpose aimed if the national legislative and institutional system offers appropriate and sufficient guarantees against abuses [45]. There are differences between actions and judgements. If the materiality of the first can be proven, the judgements cannot be proven under the aspect of their accuracy [46]. Therefore, the compliance with the condition of proportionality of the restrictive measures applied to the freedom of expression is differently seen depending on the nature of the statements. The proportionality can be seen as a strict fit of the restrictive measure when the legitimate purpose aimed is the public morals, for instance [47]. These are just a few aspects of the ECHR jurisprudence, invoked by the Romanian Constitutional Court’s jurisprudence, for the situation of analyzing the restrictive measures ordered by the Parliament or the Government, on the exercise of certain rights or fundamental freedoms.

The jurisprudence of the Romanian Constitutional Court has contributed to the identification of the particularities of the principle of proportionality applied in the area of guaranteeing the rights and fundamental freedoms, including for the cases in which the

competent state authorities order restrictive measures which must fulfil the conditions stated by Art 53.

In this area, the jurisprudence of the Constitutional Court reveals definitive features for the constitutional principle of proportionality, which refers to the necessary adequacy of the constitutional guarantees offered for the rights and fundamental freedoms with the aimed purpose, namely the protection of the exercise of the rights for the specific situations in which they could be limited. The application of the principle of proportionality has a double importance: the state guarantees on human rights become effective in specific situations; it is removed the arbitrary interference of the public authorities in the exercise of these rights or the application of certain restrictive measures in their exercise, measures representing excess of power.

The proportionality represents a guarantee of the exercise of the fundamental right, subjected to a limitation or condition. The existence of certain limitations or conditions for the performance of certain fundamental rights is justified by the idea of the constitutional protection of important human or state values. In the meaning of the above mentioned, the Constitutional Court has stated that: “the legislation, doctrine and jurisprudence have rejected and constantly reject the existence of absolute rights and freedoms” [48]. Given this premise, the court identifies the Romanian constitutional provisions establishing limits, conditions or restrictions for the exercise of certain rights [49].

Though it does not expressly refer to the principle of proportionality, the Decision No 13/1999 is important because it reveals certain particularities of this principle applied in the area of the protection of the rights and fundamental freedoms. The need of a fair balance expresses the general principle of proportionality. Also, the conditions, limitations and restrictions applied to certain fundamental rights must be appropriate to the purpose aimed by the legislator, namely to protect the fundamental right in case it could be conditioned or limited.

Through several decisions the Constitutional Court established that it has the competence to verify the compliance with the condition of proportionality for the limitation of certain rights. The Constitutional Court shall assume this competence only if the proportionality is a condition of constitutionality of the law which established the restriction of the right. “Undoubtedly the verification of proportionality falls under the competence of

the Court, for as long as the proportionality of the restriction with the situation generating it represents a condition for constitutionality of the law which ordered the restriction of the right” [50].

This ascertainment of the Constitutional Court is important for different aspects: the proportionality is considered as a condition for constitutionality that the law, which ordered the restriction of the right, must comply with. In this way, the principle of proportionality is not just a state of facts, close to opportunity, but also a rule of law that falls under the competence of the Court. Also, the Court performs a distinction between the general principle of proportionality, the proportionality applied in different areas of the law and the constitutional principle of proportionality applied in the area of limiting the exercise of certain rights. The competence of the Constitutional Court refers only to the constitutional principle of proportionality, stated by Art 53 Para 2. We also note the interpretation of our constitutional court regarding the content of the principle of proportionality applied in this area: the adequacy of the restriction with the situation generating it.

The Constitutional Court has underlined that the proportionality must be analyzed and understood also depending on the aimed legitimate purpose for which the restriction is applied. This purpose must be one of the limitedly stated ones by Art 53 Para 1. Moreover, the law which ordered the restriction of the exercise of a right must comply with the principle of proportionality, the reference to a legitimate purpose must not be generic, but it is necessary for it to be determined. Analyzing the restriction of the right to free movement through the Government Ordinance No 50/1994m, the Court has mentioned that the limitation of a constitutional right is possible according to Art 53 of the Constitution “only referring to a certain right, as a necessary measure, because without this limitation, that particular right would be affected, and according to the principle of proportionality, only within the necessary limits, for that right to not be partially compromised...or, in the absence of the statement of the right for whose use the exercise is limited, from the simple mention to the right of social protection (Art 1 of the Ordinance) or to the rights of social existence (Art 7 of the Ordinance), does not result that this restriction is imposed – as Art 53 of the Constitution – nor that is proportional with the situation generating it – as Para 2 of the same article states” [51].

The reasoning of proportionality, which in the area of limiting the exercise of certain rights assumes the adequacy of the restrictive measure to the specific situation, but also to the aimed legitimate purpose, is used by the jurisprudence of the Constitutional Court. Analyzing the compliance with the principle of proportionality for certain exceptions of unconstitutionality regarding Art 148 Para 1 Let h) of the Code of Criminal Procedure, our constitutional court has decided that the principle of proportionality is respected, given both Art 18 and Art 53 Para 2 of the Constitution. It has been ascertained that the measure of the remand is necessary for the performance of the criminal instruction and proportionate to the situation generating it [52].

In the jurisprudence of the constitutional court, the reasoning for proportionality is revealed as the analysis of the fair balance which must exist between two rights with constitutional protection, balance determining the limits of their exercise [53].

The Constitutional Court has emphasized that the compliance with the principle of proportionality, according to Art 53 Para 2 of the Constitution, has as object only the rights and fundamental freedoms [54]. In this meaning, the constitutional court has stated that the relation between the criminal offence committed and the penalty, which must be fair, exceeds the area of Art 53 Para 2 of the Constitution. "It is incontestable that the verification of the proportionality belongs to the competence of control of the Court, for as long as the object of the restriction is the exercise of certain rights or other fundamental freedoms [55].

The jurisprudence of the Constitutional Court contributes to the understanding and explaining of the principle of proportionality for the situations in which it has ascertained its interference with the principle of equality. It must be noted that the jurisprudence of our national constitutional court, in the area of interpreting and applying the principle of equality, has evolved, starting from accepting that the different situations must have different treatments, to the recognition of new constitutional rights, namely the "right to difference".

The uniformity has been constantly rejected by the jurisprudence of the Constitutional Court, in relation to the interpretation and application of the principle of equality. For the situations which by their nature are different, different treatments shall be applied. The principle of proportionality refers, in this case, to the necessary adequacy

of the legal statement with the objective situation taken into consideration. Also, the proportionality imposes the existence of a motivation “objective and reasonable” for a differentiated legal treatment applied to identical situations. These rules are stated by the jurisprudence of the Constitutional Court: “the principle of equality in front of the law refers to the establishment of an equal treatment for situations which, depending on the aimed purpose, are not different. Therefore, a different treatment cannot be just the expression of the exclusive appreciation of the judge, but must be reasonably justified, in accordance with the principle of equality of the citizens in front of the law and of the public authorities” [56].

By applying the reasoning of proportionality, the Constitutional Court reached the recognition of a fundamental right: “the right to difference”. “Generally, it is considered that the violation of the principle of equality and non-discrimination exists when a differentiated treatment is applied for equal cases, without an objective and reasonable motivation or if there is a disproportion between the purpose aimed by the unequal treatment and the means used. In other words, the principle of equality does not forbid the specific rules. This is why the principle of equality leads to the underlining of the existence of a fundamental right, the right to difference, and to the extent to which the equality is not natural, to impose it would mean the establishment of a discrimination [57].

The jurisprudence above mentioned leads to the conclusion that the understanding and application of the principle of proportionality by the Constitutional Court is in accordance with the meanings of this principle, applied in the area of the guarantees offered by the ECHR for the human rights.

Though, the jurisprudence of our national constitutional court is not generous nor edifying in the application and interpretation of the principle of proportionality in the area of guaranteeing the rights and fundamental freedoms, which proves that the proportionality, as principle of law in general, and of the constitutional law, in particular, does not represent a major object of preoccupation for the jurisprudence.

In most cases, the Constitutional Court refers to the criterion of proportionality in a generic form, invoking Art 53 of the Constitution. There is relatively a small number of decisions of the Constitutional Court comprising elements of analysis of the proportionality. It is true that the interpretation and understanding of the principle of proportionality, considered as

one of the guarantees of the rights and fundamental freedoms for the situations in which is possible the limitation or restriction of their exercise, presents serious difficulties, given the diversity of the specific situations, the margin of appreciation recognized for the legislator, the nature of the right protected and not least the interpretative reasoning of the Constitutional Court which must maintain a high level of abstraction, establishing the constitutionality of a norm by relation to the provisions of the Constitution.

CONCLUSIONS

The jurisprudence of the constitutional court is not generous nor edifying in the application and interpretation of the principle of proportionality in the area of guaranteeing the rights and fundamental freedoms, which proves that the proportionality, as principle of the general law and of the constitutional law, in particular, does not represent a major preoccupation of the jurisprudence.

Most of the time, the Constitutional Court refers to the criterion of proportionality in a generic way, invoking the provisions of Art 53 of the Constitution. There are a relatively small number of decisions of our constitutional court comprising the elements of analysis of proportionality. It is true that the interpretation and understanding of the principle of proportionality, seen as one of the guarantees of the rights and fundamental freedoms in the situations in which it is possible the limitation or restriction of their exercise, has encountered serious difficulties, given the diversity of the specific situations, the margin of appreciation of the legislator, the nature of the right and the interpretative reasoning of the constitutional court which must maintain a higher level of abstraction, establishing the constitutionality of a norm by relating to the Constitution.

The proportionality also has a moral dimension through the ideas of equity, harmony, justice that it entails, but cannot be seen as a super-normative principle to which the constitutional judge shall relate by ignoring the norms enlisted in the Constitution. As legal principle, the proportionality must be understood and applied within the limits of the normative framework, as our constitutional court does.

The proportionality is not only a principle of the constitutional law, but also a principle of the general law. Therefore, it is obvious that the constitutional norms stating and guaranteeing rights and fundamental freedoms must involve the general principle of

the law. The principle of proportionality, applied in the area of the protection of the rights and fundamental freedoms, expresses the appropriate relation between the restrictive measures ordered by the competent authorities, the specific situation and the aimed purpose, but also the balance between the two rights protected by the constitutional norms or categories of oppose interests.

The jurisprudence of the Constitutional Court, in certain decisions, refers to the principle of proportionality not only in the meaning stated by Art 53 of the Constitution, but also as general principle of the law, which assumes the comparison of different situations, the analysis of the guarantees offered by the legislator and the balance existing between two rights or divergent interests, equally under constitutional protection.

In the area of the protection of the rights and fundamental freedoms, the principle of proportionality is explicitly or implicitly invoked by the Constitutional Court in the following forms:

- a) The necessary adequacy of the constitutional and legal guarantees offered to the rights and fundamental freedoms, to the finality aimed, namely the protection of the exercise of the rights in the specific situations in which it could be restricted;
- b) An appropriate relation between the restrictive measures ordered by the law, the specific situation and the legitimate purpose, according to Art 53 of the Constitution;
- c) The “reasoning of proportionality”, as means of interpretation used by the constitutional court in order to establish the existence of a fair and equitable relation between categories and of rights and constitutionally protected interests.

For certain situations, the proportionality is invoked by the jurisprudence of the constitutional court using terms expressing the content of this principle: fair and equitable relation, reasonableness, social balance or justice.

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