THE PRINCIPLE OF PROPORTIONALITY REFLECTED IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF ROMANIA. GERMAN CONSTITUTIONAL INFLUENCES

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Abstract

This study aims at presenting a more complex image of the principle of proportionality through an analysis that combines the theoretical and the jurisprudential perspectives. The precondition of this analysis is the classic opinion of this originally German principle which requires a distinction between the objective and subjective conditions of limitation/restriction of fundamental rights/freedoms, each of which shall be subject to a separate test in order to determine whether limitations/restrictions thus established are justified. However, we reveal the way in which such principle has been accepted in the case-law of the European Court of Human Rights, of the European Court of Justice and of the Constitutional Court of Romania, indicating the variations achieved in their case-law. As concerns the acceptance manner of the principle of proportionality in the case-law of the Constitutional Court of Romania, we analyze the fundamental differences between the classic principle of proportionality, which intrinsically characterizes the relative fundamental rights/freedoms, and the principle of proportionality covered by Article 53 of the Constitution. Likewise, the focus is on the analysis of subjective conditions of limitation of fundamental rights/freedoms in the light of the proportionality test conducted by the Constitutional Court of Romania and on the need for a precise constitutional review in order to avoid the development of distorted forms of implementation of this principle.

Keywords: *constitutional review; principle of proportionality; proportionality test; theory of phases; limitation/restrictions of fundamental rights/freedoms; restriction on the exercise of fundamental rights/freedoms*

1. Introduction

The principle of the supremacy of the Constitution expresses the superordinated position of a State's Basic Law in its regulatory system, as well as its character as main source of constitutional law. Naturally, the regulations that are adopted on the basis of the Constitution must develop its normative content and comply with it. However, this principle may not be imposed and complied with when public authorities have discretion to infringe it whenever they wish. Thus, certain safeguards were imposed so that the supremacy of the Constitution would not remain solely a general declarative principle, but also find a practical implementation; the legal literature[1] has made a distinction between general safeguards and specific safeguards aimed at ensuring the supremacy of the Constitution. The general safeguards are needed across the whole system of law, and that is translated through the creation at constitutional level of a complex and efficient system of control over the application of the Constitution; such a safeguard is reflected in all forms and avenues of control that exist in a State[2]. On the other hand, a specific safeguard of the supremacy of the Constitution is the review of constitutionality, as this type of control sanctions any infringement of the Basic Law of the State. This legal safeguard is the main element amongst all concepts and techniques which ensure the supremacy of the Constitution and, therefore, in legal literature, the review of constitutionality has been qualified as the sanction for failure to respect the supremacy of the Constitution[3]. Accordingly, the review of constitutionality is the means by which the executive power and the legislative power have been obliged to submit to the constitutional rules and act in accordance with them, which equates to ensuring the primacy of generally accepted principles of law, enshrined in Constitutions[4].

In the review of constitutionality, the body entrusted with this responsibility has the difficult task to determine the content, the meaning and the interpretations which may be made both to the rule subject to review and to the rule of reference. As concerns the rule of reference it should be noted that the rule of reference is, in principle, the Constitution, whilst the determination of the meaning of its regulatory provisions is carried out by way of legal interpretation, an activity involving the identification of dimensions and limits of content, time and space in relation to the legal rules contained in the Constitution[5]. It goes without saying that such interpretation must also cover the constitutional provisions on fundamental rights and freedoms; affirmation, protection or guarantee thereof by the Constitution does not amount to attributing a fixed or unchangeable content to such rights

[1] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice*, C.H. Beck Publishing House, Bucharest, 2005, pp. 67-69.

[2] *Ibidem*, p. 68.

[3] See, to that effect, G. Burdeau, *Cours de droit constitutionnel et d'institutions politiques*, series *Les cours de droit*, Paris, 1963, p. 230 et seq.

[4] M. Cappelletti, *Judicial Review in Comparative Perspective*, in "California Law Review", vol. 58, no. 5/1970, p. 1018.

[5] I. Muraru, M. Constantinescu, S. Tănăsescu, M. Enache, G. Iancu, *Interpretarea Constituției. Doctrină și practică*, Lumina Lex Publishing House, Bucharest, 2002, p. 17.

or freedoms, but, on the contrary, to the obligation on the State authority to identify the essence of the right or freedom and adapt it, on a permanent basis, to the political, economic, social and cultural realities. Accordingly, fundamental rights are not static, by their nature, because, in that case, they themselves would become outdated in relation to the changes in society. The determination of the fundamental right or freedom comprises two aspects, *i.e.* a positive one, expressed in view of what that right/freedom includes and a negative one, in view of what cannot be subject to regulation so as not to prejudice that right/freedom, which is rather a consequence of the first with highly concrete elements, as it seems to be an illustration of the predetermined regulatory content of the rule. In this context of the analysis, we note that the principle of proportionality intervenes in an area of interference between constitutionality and unconstitutionality, and it must be applied to distinguish between measures that are apparently contrary to the fundamental right/freedom and those that are truly contrary to it. Depending on the outcome of the test relative to this principle, the body responsible for the review of constitutionality may increase/resize the scope of protection of the fundamental right/freedom[6].

2. The principle of proportionality – theoretical and jurisprudential overview

2.1. German constitutional doctrine and practice

The principle of proportionality appears in the German legal environment in the 21st century being promoted as a major instrument for the introduction of individual rights in the authoritarian system which characterised the German society at the time; according to this principle, the State had to opt for measures with the lowest degree of interference with the individual rights and its implementation in practice has been conducted successfully, first of all, in the limitation of the power of the police[7]. In this respect, it was separately regulated the power of the Supreme Administrative Court of Prussia to verify the police action (1883). The same Court, between 1882 and 1914, used intensively the principle of proportionality as a method of control of State intervention in the economic or social rights, and relevant to that effect is the *Kreuzberg* Decision (1882), whereby it annulled an act of the Berlin municipality prohibiting the construction of buildings blocking the view to the

[6] It is interesting to note that, in legal literature, a distinction is made between the express and the implied revision of the Constitution. If the first is carried out through adoption of a law for revision, the second is carried out through interpretation by the constitutional courts, expressing a so-called judicial imperialism due precisely to the continuous configuration and reconfiguration of the normative content of fundamental rights/freedoms; see D. Grimm, *Constitutions, Constitutional Courts and Constitutional Interpretation*, in *The Law/Politics Distinction in Contemporary Public Law Adjudication*, Eleven International Publishing, Utrecht, 2009, p. 33 et seq.

[7] M. Cohen-Eliya, I. Porat, *American balancing and German proportionality: The historical origins*, in "International Journal of Constitutional Law" no. 8/2010, p. 271 et seq.

national monuments, on the grounds that the State can intervene in this area only in order to prevent danger to public safety, and not for own aesthetics reasons.

This principle is not expressly provided for in the German Basic Law of 1949, but, according to the case-law of the Federal Constitutional Court, it derives from the principle of the German rule of law (*Rechtsstaat*)[8]. According to academic writings[9], it is generally accepted that the act of birth of the principle of proportionality in the constitutional case-law is the Decision delivered on 11 June 1958 – BVerfG 7, 377 – *Apothekenurteil*. Through that Decision[10], the Federal Constitutional Court has developed the "steps" theory, each step representing an ascendant intensity of the interference with the right. These steps establish either a minimum interference with the right, possibly even to promote it, or a higher interference, taking the form of subjective and objective conditions for its structuring. The subjective – objective dichotomy concerns the structuring of a fundamental right/freedom according to the criterion of the link with the individual, in the sense that a subjective structuring of the right refers to the conduct of the individual, and what is essential is its modulation in relation to the content of the right, while the objective criterion refers to the structuring of the right based on criteria unrelated to the individual, therefore criteria which cannot be influenced by him. Therefore, compliance with a subjective condition of limitation of the right is in the power of the individual (for example, the fulfilment of the conditions of access to a profession), while the objective conditions restrict the right of the individual on grounds unrelated to his conduct, willingness or option (for example, imposing a negative condition concerning the territorial dispersion to exercise a profession).

The proportionality test is specific for the analysis of the subjective conditions of limitation and structuring of the right; it involves first the determination of the aim pursued by the legislature through the interference (*Eingriff*) with the fundamental right/freedom (*Schutzbereich*) and its legitimate nature, as the test of proportionality can relate only to a legitimate aim. The justification (*Rechtfertigung)* of the interference must also be examined in light of the proportionality test under which any measure taken must be suitable (*geeignet*) – objectively able to fulfil the purpose –, necessary (*erforderlich*) – it must not go beyond what is necessary for achieving the aim – and proportionate (*angemessen*) – it must be related to the aim pursued. These three elements are cumulative and, for the correct application of the test, it is necessary to carry out a separate analysis of each of them in that specific order. Therefore, if the interference examined is contrary to one of those elements, it will be qualified as disproportionate and therefore unconstitutional, and there will be no need to examine compliance with the other elements of the test mentioned before.

Conversely, if the legislative measure is an objective condition for realising/configuring the fundamental right/freedom in a given case, it cannot be examined in the light of the

[8] *Ibidem*, p. 285.
[9] K. Möller, *Proportionality: Challenging the critics*, in "International Journal of Constitutional Law" no. 3/2012, p. 709.
[10] For the Romanian translation of this decision, see Compedium *** – *Selecție de decizii ale Curții Constituționale Federale a Germaniei*, C.H. Beck Publishing House, Bucharest, 2013, pp. 366-374.

proportionality test. It is replaced by a much stricter and perhaps more objective verification where the discretion of the Constitutional Court is very limited, *i.e.* the "last step", according to which the legislative measure can only be justified by the existence or the likelihood of occurrence of major threats to a right of a high importance. According to this test, in the structuring and implementation at legal level of a fundamental right/freedom, the legislature must determine the lowest interference with the same, and it can proceed to the next step "only where it can be demonstrated with high probability that the suspected risks cannot be fought effectively with means (*of a constitutional nature situated* – a.n.) on the previous «step»". Therefore, the principle which must guide the legislature is that of regulation of subjective conditions – related to the conduct of the person – for specification/configuration of the fundamental right/freedom and, only if there is or it is likely to be a major threat for a right of a higher importance, it will apply to the objective conditions, which go beyond the volitional scope of the individual, defined as "last step" of limitation/structuring of the fundamental right/freedom. In this case, it is for the Court to determine whether the legislature has opted for the suitable step, in other words whether the interference/limitation on the fundamental right/freedom – implicitly determining a certain structuring and configuration thereof – might be avoided or whether it could be achieved in a more moderate way, *i.e.* whether the interference "was necessarily required". For the justification of the power of review of the constitutional court, the recital in the decision of the German Federal Constitutional Court cited above is axiomatic: "If the intention was to allow the legislature the freedom to choose between «equally suitable means», situated on different steps, a situation would be reached in practice where the most drastic interference with the fundamental right would be most often chosen, *i.e.* that which is most appropriate to achieve the desired objective, precisely because it has a drastic effect; in such a situation, those means should then be accepted without any verification". Therefore, the constitutional court, regardless of the fact that the legislative measures are suitable for achieving the aim pursued, must first check whether the conditions are met for a last step regulation, if we refer to subjective conditions – objectives for structuring the right or, if we refer to subjective conditions, to verify whether the step chosen, in other words the intensity of the interference, is proportionate to the aim pursued.

Such a vision is not contrary to the principle of the separation and balance of powers, as the steps choice is not a question of legislative opportunity, but a question of constitutionality. This operation, practically, structures and shapes the right, namely its scope, precisely in the light of the conditionalities and limitations imposed by the steps. Once accepted, they determine the content of the fundamental right/freedom and the constitutional court could hardly overturn such case-law. Thus, whilst accepting inferior steps of intervention with fundamental rights/freedoms, their constitutional protection level is higher. The legislature is tempted to regulate higher steps of interference because it is the easiest way for the attainment of a purpose, even legitimate in itself. Therefore, in such a case, it is the legislature that must be censured by the constitutional court, as this is not a mere legislative option which falls outside the scope of the review of constitutionality.

The most ardent promoter of the principle of proportionality, Robert Alexy[11], shows that it consists of three sub-principles, namely suitability, necessity and proportionality in the narrower sense. The principle of suitability precludes the adoption of measures that obstruct the realization of at least one principle and which do not promote at least the purpose for which they were adopted. In this respect, an example is found in a decision of the German Federal Constitutional Court declaring unsuitable a legal provision concerning the mandatory nature of the shooting examination in case of persons applying for a falconry licence. The Court held that no substantial clear reason existed for the infringement of the general freedom of action of the falconer, leading to the conclusion that the measure was unproportional, and for that reason it was declared unconstitutional. It should be noted that the cases in which measures are declared unsuitable are rare because normally any measure will promote its purpose, which suffices for suitability; for this reason, the practical relevance of this sub-principle is rather low.

The principle of necessity implies that between two equally suitable means promoting a particular right/principle, the one that interferes less intensively with another right/principle must be chosen. In this respect, an example is a decision of the German Federal Constitutional Court declaring unproportional and therefore unconstitutional a legislative measure prohibiting the production of puffed rice sweets. The Court found that this measure was adopted in order to avoid the confusion of these products with those of chocolate, but it showed that consumer protection could be achieved in an equally effective but less incisive way by a duty of marking; therefore, the Court found that the examined measure was unproportional.

According to the third sub-principle, *i.e.* the principle of proportionality in the narrower sense, a kind of "law of balancing" – *Optimierungsgebote* –, the constitutional courts must promote the balance of principles, in the sense that the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the colliding principle. To carry out this analysis, the author proposed the formulation relating to the use of the right/principle in a given constitutional system ("*Weight formula*")[12], a formulation that defines the weight of a right/principle in a concrete case relative to a colliding principle. This formulation takes into account the intensity of the limitation of the concurring constitutional values, the weight assigned to these values in the constitutional system and the extent to which the measure contributes to the *non-realization* of a value and the *realization* of the other. These elements are used and multiplied, separately, in relation to the limited right and, respectively, in relation of the right in favour of which it is limited; subsequently, the resulting product relative to the limited right is divided to that relative to the right in favour of which it was limited, and if the resulting quotient is greater than 1, the limitation imposed on that right is excessive,

[11] R. Alexy, *Constitutional Rights and Proportionality*, in "Revues" (online), no. 22/2014, pp. 52-57, and, for more details in terms of philosophy of law, see *idem*, *A Theory of Legal Argumentation*, Clarendon Press, Oxford, 1989, and *A Theory of Constitutional Rights*, Oxford University Press, Oxford, 2002.

[12] For a simplified formula, see R. Alexy, *Balancing, constitutional review, representation*, in "International Journal of Constitutional Law" no. 4/2005, pp. 575-577.

whilst if that is equal to 1, the limitation pertains to the margin of appreciation of the legislature – a kind of *in dubio pro reo*. Only if it is less than 1, the limitation is proportionate[13].

The principle of proportionality was also subject to adaptations, in the form of the simplified proportionality test – analysing only the first two sub-principles, where the key element of the analysis is structured around the second sub-principle, expressed as the least restrictive measure of limitation of the right – and the Wednesbury reasonableness test, under which a measure adopted by a public authority must be regarded as unreasonable if it is based on matters irrelevant for the purpose had in view by the public authority or is "so absurd that no sensible person could ever dream that it lay within the powers of the authority"[14].

Furthermore, it is also noted that, even if the principle of proportionality is used increasingly in the proceedings before constitutional courts, the use of the test subsumed to it is criticised because it does not always involve a comparison of comparable values, because these values are incalculable or because there cannot be made a hierarchy of constitutional values[15]. Nevertheless, we cannot help noting that these aspects represent the difficulties of the proportionality test, but they cannot, however, be regarded as insurmountable. It is true that the subjective logic of the constitutional judge will always exist in the light of his scale of values and that this test, however objective it may be intended to be, falls under the appreciation and perception of the constitutional judge, rendering its elements – more specifically the formula – variable. Finally, we consider that the necessity of the proportionality test arises due to the overlapping between different rights and principles, so that they cannot be classified as completely unconnected and, therefore, there is an area of interference between them, an area which is adjusted by means of the proportionality test.

Accordingly, we note that the principle of proportionality departs from the rule of rigidity of content of principles of law or fundamental rights, being qualified as a "means-result" test, in which the result reached is in itself a means to achieve a wider or more general result or aim[16]. It is part of the *invisible Constitution*, a concept which expresses a consistent conceptual scheme based on the constitutional court's decisions which develop

[13] The above may be expressed in the following formula:

$$W_{lf} = \frac{I_l * V_l * R_l}{I_f * V_f * R_f}$$

where I_l stands for the intensity of the interference with the right, V_l for the weight of the limited right, R_l for the value of *non-realization* of the limited right, I_f for the intensity of the interference with the right in whose favour it was regulated, V_l for the weight of the right in whose favour the interference was regulated, and R_l for the value of *realization* of the right in whose favour the interference was regulated.

[14] N. Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, in "German Law Journal" no. 8/2013, pp. 1393-1398.

[15] *Ibidem*, pp. 1388-1393.

[16] A. Dyevre, A. Jakab, *Understanding Constitutional Reasoning*, p. 1012. Foreword to the special issue of the "German Law Journal" no. 8/2013, dedicated to constitutional argumentation.

the principles and rights laid down by the Constitution[17]; the invisible Constitution, seen as the standard of constitutionality, includes the principle of proportionality, since by means of this principle the constitutional judge may add new valences to the existing constitutional texts. Therefore, proportionality is seen both as a means of interpretation and as a general principle of law, but independently of this qualification it is the solution for optimisation of two competing/colliding constitutional values; they must be limited so that each of them can achieve the optimum purpose/effect. Equally, limitations may not go beyond what is necessary in order to achieve consistency/balance between the two values[18].

In view of the above, it is clear that in order to review the constitutionality of measures aimed at structuring fundamental rights/freedoms by regulation of the limits thereof, a constitutional court should follow the following stages:

a) determination of the objective or subjective nature of the measure;

b) where it concludes that the legislative measure in question is objective, therefore a "last step" measure, it will verify whether this is justified by the existence or the likelihood of threats to a right of major importance, and depending on the result of this analysis, it will determine its constitutionality or, on the contrary, its unconstitutionality;

c) if it concludes that the legislative measure in question is subjective, it will verify whether this is justified in the light of the legitimate aim pursued, and it will carry out, in this respect, a proportionality test, seeking to ascertain whether the limitation of the fundamental right/freedom is justified and, therefore, the step chosen is correct and, depending on the result, it will determine the constitutionality or, on the contrary, the unconstitutionality of the legislative measure under examination.

2.2. The principle of proportionality in the case-law of the European Court of Human Rights and in that of the Court of Justice of the European Union

The Convention for the Protection of Human Rights and Fundamental Freedoms expressly states, in Articles 8 to 11, that the rights enshrined therein may be subject to limitations/ restrictions. These limitation clauses [set out in para. (2) of the texts mentioned before] are expressed by the triptych "provided by the law", legitimate aim pursued and "necessary in a democratic society"; they should be interpreted restrictively since they provide an exception from the rules laid down in para. (1) of the above-mentioned texts of the Convention[19]. In turn, the first standard mentioned, *i.e.* "provided by the law" includes

[17] See the concurring opinion of the former President of the Constitutional Court of Hungary, Sólyom László, with respect to the Constitutional Court Decision no. 23/1990 (X.31) on capital punishment.

[18] Donald P. Kommers, *Germany: Balancing Rights and Duties*, in *Interpreting Constitutions: a Comparative Study*, p. 203, *apud* M. Arshakyan, *The Impact of Legal Systems on Constitutional Interpretation: A comparative analysis: The U.S. Supreme Court and the German Federal Constitutional Court*, in "German Law Journal" no. 8/2013, p. 1329.

[19] See, with regard to Article 8 of the Convention: Judgement of 6 September 1978 in Case *Klass and Others vs. Germany*, para. 42; Judgement of 17 July 1981 in Case *Association Ekin vs. France*, para. 56; Judgement of 25 February 1993 in Case *Miailhe vs. France (1)*, para. 36; Judgement of 4 May 2000 in Case *Rotaru vs. Romania*, para. 47; Judgement of 31 July 2012 in Case *Drakšas vs. Lithuania*, para. 54; Judgement of 7 July 2015, in Case *M.N. and Others vs. San Marino*, para. 73. With regard to Article 9: Judgement of 14 June 2007 in Case *Svyato-Mykhaylivska*

two key components, namely accessibility and foreseeability of the rule, whilst the second standard, *i.e.* the legitimate aim pursued, concerns the prohibition to enact arbitrary measures. The most important standard in the Convention relates to the fact that the interference must be necessary in a democratic society; the necessity implies that the interference must correspond to a pressing social need, the interference must be proportionate to the legitimate aim pursued and the reasons invoked by the national authorities to justify it must be relevant and sufficient[20]. In assessing the pressing social need, the Member States have a certain margin of appreciation, but it is subject to scrutiny by the European Court of Human Rights, both in terms of the legislative measures adopted and in terms of the decisions given in their implementation, including those issued by the courts.

It follows from the wording of the Court that the interference must correspond to the purpose, it must be appropriate, it must contribute substantially to the achievement of the aim pursued, because otherwise the reasons underlying it would not be relevant and sufficient, *i.e.* it must be necessary. Furthermore, a proportionality requirement is added, and that consists of the verification of the fair balance between the competing interests. In legal literature it was pointed out that the "necessity test" of the Court is an autonomous concept in relation to the classical theory of the principle of proportionality, suggesting even its alignment to the classical theory[21].

As concerns the fundamental rights which do not contain a clause explicitly limiting them, the case-law of the European Court has developed the so-called doctrine of implicit limitations of fundamental rights[22]. Accepting the implicit limitations of the right, the Court broadened the scope of the States' margin of appreciation, and, in order to evaluate whether Member States have remained within that margin of appreciation, the Strasbourg Court applies the principle of proportionality. The higher becomes the proportionality standard, the more is the margin of appreciation reduced[23].

However, according to the settled case-law of the Court of Justice of the European Union, the principle of proportionality, which is one of the general principles of the European Union law, requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate

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Parafiya vs. Ukraine, para. 132; Judgement of 12 February 2009 in Case *Nolan and K. vs. Russia*, para. 73. With regard to Article 10: Judgement of 20 May 1999 in Case *Rekvényi vs. Hungary*, para. 42, and with regard to Article 11: Judgement of 7 December 1976 in Case *Handyside vs. the United Kingdom*, para. 49; Judgement of 8 July 1986 in Case *Lingens vs. Austria*, para. 41; Judgement of 23 September 1994 in Case *Jersild vs. Denmark*, para. 37 or Judgement of 15 November 2007 in Case *Galstyan vs. Armenia*, para. 114.

[20] Judgement of 26 April 1979 in Case *Sunday Times vs. the United Kingdom*, para. 59, and Judgement of 8 July 1986 in Case *Lingens vs. Austria*, para. 39-40.

[21] J. Gerarrds, *How to improve the necessity test of the European Court of Human Rights*, in "International Journal of Constitutional Law" no. 2/2013, p. 488.

[22] *Ibidem*, pp. 466-467; M.-A. Elssen, *The principle of proportionality in the case-Law of the European Court of Human Rights*, in the compedium coordinated by R.St.J. Macdonald, F. Matscher, H. Petzold, *The European System for the protection of human rights*, Martinus Njhoff Publishing House, Dordrecht, 1993, pp. 135-137.

[23] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia Publishing House, 2001, pp. 13-14.

objectives pursued by the legislation in question, and it is established that, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued[24]. Therefore, it seems that the Court of Justice of the European Union applies the classic proportionality test; however, we must observe that the Court's tendency is to reduce the three sub-principles of the test in the sense that it subsumes the proportionality test to the examination concerning the suitability and the necessity of the measure, with the proviso that the latter is a *sui generis* notion in relation to the classic test, consisting of both the necessity and the proportionality itself and it is therefore a mix between determination of the least onerous measure – what is necessary – and the weight of a right in favour/at the expense of another[25]. In this context, it must be recalled that, according to Article 52 para. (1) of the Charter, "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms*. *Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*"; this text is a general one and sets out the conditions under which fundamental rights/freedoms may be restricted[26] with direct reference to the principle of proportionality already enshrined in the case-law of the Court.

Another aspect to be looked into is the margin of discretion of the EU legislature in restricting fundamental rights. The Court indicated that this margin varies depending on the area concerned, the nature of the right, the nature, gravity and purpose of interference; thus, the discretion is reduced, for example, with regard to the protection of personal data, with strict control of the Court on the application of the principle of proportionality[27]. On the other hand, the EU legislature is accorded a broad discretion in areas where its action involves political, economic and social choices and where it is called upon to undertake complex assessments and evaluations, so that the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate in terms of the objective which the competent institution is seeking to pursue[28].

[24] Judgement of 12 July 2001 in Case C-189/01 *Jippes and Others*, para. 81, Judgement of 7 July 2009 in Case C-558/07 *S.P.C.M. and Others*, para. 41, Judgement of 9 March 2010 in Cases C-379/08 and C-380/08 *ERG and Others*, para. 86, as well as Judgement of 8 July 2010 in Case C-343/09 *Afton Chemical Limited*, para. 45.

[25] Judgement of 8 April 2014 in Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd*, para. 46, Judgement of 10 December 2002 in Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, para. 122, Judgement of 18 June 2015 in Case C-508/13 *Republic of Estonia vs. European Parliament and Council of the European Union*, para. 28.

[26] See the explanations relating to the Charter of Fundamental Rights, published in the Official Journal of the European Union C 303 of 14 December 2007, p. 32.

[27] Judgement of 8 April 2014 in Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd*, para. 47-48.

[28] Judgement of 10 December 2002 in Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, para. 123, and Judgement of 8 June 2010, in Case C-58/08 Vodafone and Others, para. 52, or Judgement of 18 June 2015 in Case C-508/13 *Republic of Estonia vs. European Parliament and Council of the European Union*, para. 29.

3. The principle of proportionality reflected in the case-law of the Constitutional Court

3.1. Relative and absolute rights

In its case-law, the Court stated that the Basic Law comprises two categories of rights, namely absolute rights (e.g. the right to life and the right to physical and mental integrity), which State authorities can not prejudge in any circumstances, and relative rights whose *exercise* may be restricted under certain conditions[29]. Through this statement, the Court established, virtually in a confirmational manner that, upon determining the content of fundamental rights/freedoms the ordinary legislature has a differentiated margin of discretion; thus, with regard to certain fundamental rights/freedoms the legislature has no margin of discretion, and they are therefore qualified as "absolute rights", while on others, also covered by the constitutional texts, the legislature enjoys a greater or lesser margin of discretion ("relative" or "conditional" rights[30]).

The steps theory and the proportionality test cannot be applied in relation to absolute rights, whereas any legislative measure which introduces limits or conditions on them is *ab initio* an infringement of their absolute nature. Therefore, the legislature can only create safeguards for their compliance. Instead, the legislature has the right to intervene in the structuring of the other fundamental rights/freedoms – relative rights – as in their respect its discretion is different according to the degree of protection afforded to them by the Constitution. Only in this context there is a dichotomy consisting of subjective versus objective conditions, where the Court may apply the "last step" test or the proportionality test, as the case may be.

It should be noted that, as concerns the regulation of the subjective conditions for structuring the right, the proportionality test has become increasingly necessary in a society where the legislature does not tend to openly/brutally oppose constitutional concepts, but, through its work, it seeks to respect them and sees that the legislative measures are an expression of them. However, the power to establish whether these laws respect or not the constitutional text lies with the Constitutional Court; in this context, it is noted that the proportionality test is an indispensable tool in analysing this relationship, as it can be applied whenever there is a State intervention relating to the normative content of the fundamental right/freedom.

From the above, it follows that the proportionality test may be performed when (a) the interference concerns a right qualified as absolute in the case-law of the Constitutional Court; (b) when the legislature has covered an objective condition of limitation of the right,

[29] Decision no. 356 of 25 June 2014, published in Official Gazette of Romania, Part I, no. 691 of 22 September 2014, para. 33.
[30] See Decision no. 1258 of 8 October 2009, published in Official Gazette of Romania, Part I, no. 798 of 23 November 2009.

the "last step" test is applicable. To these self-evident hypotheses, we would add a third one resulting, this time, from the Constitutional Court Decision no. 64 of 24 February 2015[31], where it was stated that "the legislature may adjust the configuration of the right, with due regard for the principle of proportionality, according to the above mentioned particularities, but, it is clear that it cannot deny this right. In the present case, the Court notes that the legislature, by the way in which it sought to regulate the procedure of collective redundancies in companies in insolvency proceedings, has denied the right to information and consultation of employees, which is equivalent to overriding the provisions of Article 41 para. (2) of the Constitution, so that, by definition, the proportionality of the measure does not require consideration, given that the impugned legal text is unambiguous". Thus, where a legal text contradicts the explicit or implicit normative content of the text of the Constitution, *i.e.* the essence of the regulatory content of the fundamental right/freedom, the analysis of the proportionality of the measure can no longer be made, as it occurs in case of optimisation of the right and not in case of its denial, therefore in that interference area between unconstitutionality and constitutionality.

3.2. Constitutional basis of the principle of proportionality

An issue which needs to be addressed is that relating to the determination of the constitutional text based on which the legislature may establish limitations or conditions on the fundamental right/freedom. At first sight the constitutional basis would be the provisions of Article 53 of the Constitution, according to which the legislature may restrict the exercise of certain rights or freedoms[32]. An argument in that regard is that the principle of proportionality is set out in the text itself of Article 53 para. (2) of the Constitution. However, we cannot agree to that for reasons which we will explain below.

Therefore, most articles governing fundamental rights/freedoms refer to the law, as a technical means of determining the content, the limits or the modalities for the exercise thereof; in this way, the complex normative content of constitutional rules is translated into laws and the Constitutional Court must check whether these legislative measures comply with the limits and the regulatory framework established by the Constitution. Even if in case of certain rights/individual freedoms the Constitution does not refer to the law, this does not mean that they are considered absolute rights; on the contrary, also these constitutional rules contain by default a provision by which the ordinary or organic legislature modulates them depending on the concrete situation of the person or the general interest; in this regard, we consider, for example, the right to private life or the secrecy of correspondence in relation to which the Constitution does not specifically state that they could be subject to conditions/limitations; however, they are not absolute in nature and, by default, are subject

[31] Published in Official Gazette of Romania, Part I, no. 286 of 28 April 2015.
[32] See, to that effect, M. Andreescu, *Principiul proporţionalităţii în dreptul constituţional*, C.H. Beck Publishing House, Bucharest, 2007, pp. 298-344.

to such inherent conditionality of the right[33]. Likewise, to that effect, we mention Decision no. 80 of 16 February 2014, whereby the Court, examining the constitutionality of an initiative for the revision of the Constitution, declared unconstitutional the deletion of the second sentence of Article 44 para. (1) of the Constitution on establishing by law the limits and the content of the right to property. Basically, it reached that conclusion in view of the fact that, through the deletion of this sentence, which expressly allows limitation of the right, it could not have been considered that, by default, the right can be further restricted, but, on the contrary, it would have been reached an absolutisation of the right. In this respect, the Court emphasized that such deletion "absolutises the right to property, and the legislature will no longer be able to protect the competing fundamental rights and freedoms of the other citizens" (para. 147 of the decision).

Therefore, the limitations or the conditions relating to a fundamental right/freedom are established under the constitutional text governing them, precisely because they are related to its natural content, and, at the same time, they are a constant of the fundamental right/freedom. Therefore, they do not intervene in exceptional situations that arise in a society at a given time, they do not reflect any deviation from ordinary and, therefore, do not have a temporal ephemeral existence or efficiency. By way of example, we mention the limitations to the individual freedom (detention or arrest) laid down in Article 23 of the Constitution; even though they are established over a strictly determined period of time, they have a continuous existence in time, accompanying, practically, the right to individual liberty, as well as the conditionalities to the free access to justice (limitation/revocation periods) covered by Article 21 of the Constitution itself, which in themselves have a continuous existence in time.

By contrast, as concerns Article 53 of the Constitution, we consider that its scope of application concerns the case where an infringement of the fundamental right/freedom has been detected, due to exceptional conditions in the State. We consider that, in this case, the legislative measure has infringed the right, without, however, annihilating/denying it, since, in this case, Article 53 of the Constitution can no longer be a constitutional justification for the interference with the fundamental right/freedom. Therefore, that right can still be exercised but not in its entirety. What is also an important feature attached the examined constitutional text is the temporary nature of the limitation on the exercise of the individual right/freedom, as the legislature, once the situation giving rise to such a measure ceases, is obliged to revert to the exercise of the respective fundamental right/freedom in the full range of its content. The case-law of the Constitutional Court is quite diversified with regard to the application of Article 53 of the Constitution, but we will mention a few decisions that illustrate the above mentioned issue. We have in mind Decision no. 71 of 15 December 1993[34] and Decision no. 139 of 14 December 1994[35], whereby it was examined in detail for

[33] See, to that effect, Decision no. 80 of 16 February 2014, published in Official Gazette of Romania, Part I, no. 246 of 7 April 2014, and Decision of the Constitutional Court no. 222 of 2 April 2015, published in Official Gazette of Romania, Part I, no. 380 of 2 June 2015.
[34] Published in Official Gazette of Romania, Part I, no. 305 of 23 December 1993.
[35] Published in Official Gazette of Romania, Part I, no. 353 of 21 December 1994.

the first time in the case-law of the Constitutional Court the scope of Article 53 of the Constitution.

To better understand the analysis of the Constitutional Court, we note first that, under the impugned legal solution, the Romanian citizens travelling abroad on holiday or for personal interest reasons had the obligation to pay a duty at each exit for the funding required for payment of aid money from the State budget for domestic heating in the period 1 November-30 April 1994. On this obligation incumbent on Romanian citizens, the Court stated that "the imposition of that duty is not intended as a financial impediment to exercising the right to free movement, but as a method of provisioning budgetary sources for the payment of the aid [...]. Obviously, such a modality shall not be construed as a matter of principle. Currently, it is justified by the exceptional situation resulting from lack of budgetary funds needed to set up a protection measure under Article 43 para. (1) of the Constitution. […] it follows that, after the expiry of the time-limit for granting such aid, which is 30 April 1994, the duty is no longer of a constitutional nature and therefore may not be perceived". What matters is therefore that the enacting of this duty did not constitute in itself a definition of the normative content of the right to free movement, but a temporary restriction on its exercise, in other words the implementation of the normative content of the right was conditional, for a specific time period, on the performance of a task/obligation unrelated to the right; thus the State fulfils its obligation to take measures to ensure social protection of its citizens. It is found that once the exceptional circumstance, timeframed in-between 1 November 1993-30 April 1994, would cease, the restriction on the exercise of the right would cease as well. If that was an intrinsic part of the right to free movement setting the limits of the right as a matter of principle, then we would not discuss of a constitutional obligation incumbent on the legislature to cease the measure, but of a right of the legislature to reconsider it on grounds of opportunity. It is also noted that, since "the restriction on the exercise of certain rights cannot infringe upon their existence, the value of the duty needs not to have a prohibitive nature, rendering impossible the exercise of the right to free movement"[36]; in other words, Article 53 of the Constitution justifies a restriction of the exercise of the right and not a denial of this exercise, as otherwise the substance/the essence of the right, namely its normative content would be affected.

It must be noted that, subsequently, this duty was made permanent by the legislature, so that a limitation on the exercise of the right has become a component of the right to free movement, which amounted to a change in its normative efficiency. However, in terms of the content of the right, the free movement as a fundamental right/freedom excludes in principle the levying of such charges and, accordingly, such measures could be justified only in the realm of Article 53 of the Constitution. In this respect, the Court, by Decision no. 139 of 14 December 1994, to reach the conclusion on the unconstitutionality of the measure, stated that it "creates a restriction to the right of free movement provided under Article 25 of the Constitution, a restriction of a permanent nature and as a matter of principle", emphasizing thereby the transfer of the examined measure from the registry of restriction

[36] Decision no. 75 of 13 July 1994, published in Official Gazette of Romania, Part I, no. 190 of 25 July 1994.

of the right to that of definition of the right. Therefore, the exceptional situation which led to such a measure of restriction on the exercise of the right may not characterise, structure and shape the right itself. Certainly, the legislature could maintain this restriction if the exceptional situation continues and, consequently, limit the exercise of a right in order to safeguard another right, which the legislature considers of paramount importance.

Another application of Article 53 of the Constitution was carried out by Decisions no. 872 and 874 of 25 June 2010[37]regarding the entitlement to salary, part of the right to work. The criticised legislative measure concerned the 25% cut in public sector pay during the period July-December 2010. The Court pointed out that "the restriction on the exercise of a right should only cover the duration of the threat in the light of which that measure was laid down", and the timeframe for the implementation of the law did regulate this aspect. Consequently, as of 1 January 2011, it was to be resumed the pay of salaries/allowances and military pays granted before the adoption of these reduction measures, upon complying with the social and employment policies, which, in turn, had to fall under the budgetary expenditure. Thus, after the application of the impugned measures, it was to be maintained the same amount of salaries/allowances and military pays as before the cuts established by the impugned law. "It is an obligation of result imposed by the legislature, because, otherwise, it would be breached the temporary nature of restriction on the exercise of the rights; however, at the heart of the wording of Article 53 of the Constitution is precisely this temporary nature of the restriction on the exercise of the rights"[38]. As a comparison, we mention the Court's analysis on the legislative measure aimed at reducing the amount of pensions, based on which it was established its unconstitutionality with reference to Article 47 on the right to pension; this right by its normative content excluded the possibility of lowering the amount of pensions, irrespective of amount or duration, since it is determined on the basis of the social security contributions paid by the insured person over the time. In this respect, the Court pointed out that Article 53 of the Constitution, invoked as the basis for restricting the exercise of the right in question, is irrelevant in the case, for that Article 53 of the Constitution cannot be applied in conjunction with Article 47 of the Constitution concerning the right to pension. Such a conclusion is apparent from the fact that the calculation of the amount of pensions lies at the heart of the right to pension, and its decrease would undermine the substance/essence of the right.

In conclusion, we consider that Article 53 of the Constitution concerns the restriction on the exercise of a fundamental right/freedom the legislative content of which has been configured precisely in the light of the principle of proportionality. Such a restriction is *de plano* contrary to the fundamental right/freedom and, in order to justify such an interference with the exercise of the right, the Court will call on the mechanism covered by Article 53 of the Constitution. This mechanism is triggered where a "circumstance" leading to the restriction arises [Article 53 para. (2)], in other words, when the political, economic,

[37] Published in the Official Gazette of Romania, Part I, no. 433 of 28 June 2010.
[38] See also Decisions no. 1655 and 1658 of 28 December 2010, published in the Official Gazette of Romania, Part I, no. 51 of 20 January 2011 and no. 44 of 18 January 2011.

social or cultural life of the State experiences a break incompatible with the natural exercise of the regulatory content of the fundamental rights/freedoms; such a "circumstance" by virtue of which the adoption of a temporary legislative measure is deemed necessary is unrelated to the conduct/will of the person, it is independent from the person[39]. In this context, a *sui generis* proportionality test is to be performed, as the text under consideration indicates, exhaustively, the legitimate purpose for which the restriction on the exercise may be regulated, as well as the necessary and proportionate nature of the restriction. In this normative context, the proportionality expresses mainly an idea of temporality, *i.e.* the restriction on the exercise of the fundamental right/freedom will cease when the "circumstance" which engendered it ceases as well. Incidentally, it concerns the proportionality in the narrower sense, namely compliance with a law of balance, as it is well known that a restriction on the exercise of a fundamental right/freedom becomes a realisation to a higher degree of the exercise of colliding fundamental right/freedom or principle. In order to avoid an imbalance between them, the Court will have to apply in this case an adapted version of the weight formula in our constitutional system. At the same time, we note that the term "necessary" under Article 53 para. (1) overlaps with the term necessary in a democratic society contained in para. (2) of the same constitutional text, both referring to the lowest interference with the exercise of the right.

Finally, we note that Article 53 of the Constitution differs in terms of the normative content from Article 52 of the Charter of Fundamental Rights of the European Union, in that it is applicable in situations that represent a deviation from the normal exercise of fundamental rights/freedoms, whilst Article 52 of the Charter is the general rule for establishing conditionalities/limits/restrictions that characterise the natural exercise of fundamental rights/freedoms.

3.3. Relevant case-law on the principle of proportionality

The *expressis verbis* adoption of the principle of proportionality according to the German model and of the test related thereto was carried out for the first time in the case-law of the Constitutional Court of Romania by Decision no. 266 of 21 May 2013[40]. By that decision the Court had to determine whether the obligation incumbent on cable operators that retransmit programme services through electronic communications networks to include in their offer the programmes of the Romanian Society for Television, programmes intended for the public in Romania, as well as other programmes, free-to-air and without technical or financial conditionality in relation to private broadcasters under the jurisdiction of Romania, within the limit of 25% of the total number of programme services distributed

[39] In that context, we consider that, from a purely formal point of view, Article 53 of the Constitution may be applied only in respect of legislative acts of limited temporal application, and not in respect of those with indefinite temporal scope governing however concepts that are applied or should be applied within certain time periods (for a different view, see Decision no. 21 of 3 February 2000, published in Official Gazette of Romania, Part I, no. 159 of 17 April 2000, Decision no. 712 of 4 December 2014, published in the Official Gazette of Romania, Part I, no. 33 of 15 January 2015).
[40] Published in Official Gazette of Romania, Part I, no. 443 of 19 July 2013.

by the respective network comply with the constitutional requirements of the right to private property. In order to settle this challenge of unconstitutionality, the Court analysed this interference with the cable operators' right to private property in the light of the principle of proportionality, precisely to determine whether that interference is compatible with Article 44 of the Constitution on the right to private property. The Court made express reference to the case-law of the German Federal Constitutional Court and stated that in the application of the principle of proportionality it is first necessary to determine whether the measure under examination concerns a fundamental right/freedom covered and therefore protected by the Constitution, and then analyse whether this measure constitutes an interference with/breach of the same. If the answer is positive and the measure under examination constitutes an interference, it must be justified by means of the principle of proportionality. To apply it, the Court must first determine whether the interference pursues a legitimate aim, and, if so, the Court is to carry out the actual proportionality test. To meet the requirements of the principle of proportionality, the measure should be "suitable – "objectively able to fulfil the purpose –, necessary – it must not go beyond what is necessary to achieve the purpose – and proportionate – it must correspond to the aim pursued. For the correct application of the test, it is required the examination of each of the 3 elements in that order".

In the present case, the Court has held that such a limitation of the right to private property is suitable, necessary and it respects a fair balance between the cable operators' right to private property on their programmes offer, on the one hand, and the citizens' right to information and access to culture, on the other. In other words, the individual interest of the cable operators circumscribed to their right to private property is contrary to the collective interest of citizens circumscribed to the right to information and access to culture of the recipients of the service provided, and having made a comparison between the competing interests, the Court came to the conclusion that the interference with the citizens' right to information and access to culture would be much higher if there was no such a limitation of the cable operators' right to property. Therefore, it declared constitutional the legal provision subject to constitutional review. We would like to add that, taking into account Alexy's formula, in this case, the quotient between the limited right and the right in favour of which the limitation was adopted is less than 1, so that the limitation on the right to private property must be regarded as proportionate to the legitimate aim pursued. Only if this quotient was equal to or above 1 the limitation of the right to property would have appeared as disproportionate, and the legislative measure under examination would have been unconstitutional, *i.e.* contrary to Article 44 of the Constitution.

It is important to note that our Constitutional Court has emphasized that the elements falling under the proportionality test must be examined in a particular order, namely the suitability – the necessity – the actual proportionality of the legislative measure. Such an order in the analysis reflects the determination of the intervention of the Constitutional Court, namely from minimum intervention characterising the suitability up to a maximum one which characterises the fair balance between the competing interests.

The principle of proportionality, in its classical meaning, is reiterated and developed in a number of subsequent decisions of the Constitutional Court, among which: Decision no. 80 of 16 February 2014, cited above, Decision no. 270 of 7 May 2014[41], Decision no. 390 of 2 July 2014[42], Decision no. 462 of 17 September 2014[43], Decision no. 539 of 15 October 2014[44], Decision no. 618 of 4 November 2014[45], Decision no. 662 of 11 November 2014[46], Decision no. 686 of 26 November 2014[47], Decision no. 692 of 27 November 2014[48], Decision no. 762 of 18 December 2014[49], Decision no. 724 of 16 December 2014[50], Decision no. 13 of 15 January 2015[51], Decision no. 253 of 7 April 2015[52] and Decision no. 485 of 23 June 2015[53]. To the same effect, we mention Decision no. 266 of 7 May 2014[54], in which the Court does not expressly mention the principle of proportionality, but the reference to it is evident in the following statement: "Any limitation of this right (of free access to justice – a.n.), regardless how small, must be duly justified, examining whether the disadvantages caused by it do not outweigh the possible advantages", a statement which is a development of the actual analysis of proportionality; thus, the fair balance between the competing interests must be analysed in terms of both the weight of the competing fundamental rights/freedoms and the advantages and disadvantages of the interference in the structuring of the fundamental rights/freedoms.

By those decisions, the Court has applied the principle of proportionality considering, in assessing the right balance, the margin allowed to the State in protecting national interests in economic and financial activity in relation to the economic freedom of persons[55] or the right to private property[56], the margin of the State to ensure the necessary financial

[41] Published in Official Gazette of Romania, Part I, no. 554 of 28 July 2014.
[42] Published in Official Gazette of Romania, Part I, no. 532 of 17 July 2014.
[43] Published in Official Gazette of Romania, Part I, no. 775 of 24 October 2014.
[44] Published in Official Gazette of Romania, Part I, no. 960 of 30 December 2014.
[45] Published in Official Gazette of Romania, Part I, no. 75 of 28 January 2015.
[46] Published in Official Gazette of Romania, Part I, no. 47 of 20 January 2015.
[47] Published in Official Gazette of Romania, Part I, no. 68 of 27 January 2015.
[48] Published in Official Gazette of Romania, Part I, no. 88 of 2 February 2015.
[49] Published in Official Gazette of Romania, Part I, no. 145 of 26 February 2015.
[50] Published in Official Gazette of Romania, Part I, no. 120 of 16 February 2015.
[51] Published in Official Gazette of Romania, Part I, no. 175 of 13 March 2015.
[52] Published in Official Gazette of Romania, Part I, no. 428 of 16 June 2015.
[53] Published in Official Gazette of Romania, Part I, no. 539 of 20 July 2015.
[54] Published in Official Gazette of Romania, Part I, no. 464 of 25 June 2014.
[55] The Court has established that the unilateral termination of the private-public partnership by the public partner, motivated by the existence of an exceptional case related to the national interest [therefore, pursuant to Article 135 para. (2) letter b) of the Constitution in regard to economic activity], without specifically regulating the situations which may lead to such contractual penalties, restricts the right to economic freedom, resulting in the unconstitutionality of the examined legal measure (see, in this respect, Decision no. 390 of 2 July 2014, para. 37).
[56] The Court found that one of the measures taken to ensure the functionality of the system for compensation with regard to the properties abusively taken between 6 March 1945 and 22 December 1989 [*i.e.* within the meaning of Article 135 para. (2) letter b) of the Constitution in regard to economic activity], consisting of the failure to update the compensation at the time of payment thereof, although a measure equivalent to a cap on the amount of the compensation, it is a proportionate restriction of the right to private property (see, in that regard, Decision no. 686 of 26 November 2014, para. 30-35, Decision no. 253 of 7 April 2015, para. 30-35, and Decision no. 253 of 7 April 2015, para. 17). The Court has also held that the regulation of a new system for the calculation of the value of the compensation for properties abusively taken over the period from 6 March 1945 to 22 December 1989 to ensure

resources for the State budget in relation to the right to private property of the person[57], the margin of the legislature to establish the court proceedings in relation to the free access to justice[58], or the structuring of the right to private property in relation to the certainty of legal relations[59], the economic freedom, the good neighbourliness[60] and the environmental protection[61]. Having performed the test of proportionality, the Court was able to optimise the competing fundamental principles and rights, while setting limits with regard to their regulatory scope. It is, therefore, noted that the principle of proportionality modulates both the regulatory tension between various competing rights/freedoms and that between fundamental rights/freedoms, on the one hand, and constitutional principles, on the other. Of course, the exercise of the right/constitutional principle thus structured is at the sole discretion of the individual/citizen within its normative content.

It should be noted that, under the influence of the case-law of the Court of Justice of the European Union, by Decision no. 440 of 8 July 2014[62], the Court has departed from the three elements of the principle of proportionality, taking into account in its analysis the

budgetary balance and to arrive at a lesser constructed value thereof [therefore, within the meaning of Article 135 para. (2) letter b) of the Constitution on the financial activity] constitutes a proportionate restriction of the right to private property (Decision no. 618 of 4 November 2014, para. 24, and Decision no. 724 of 16 December 2014, para. 46).

[57] The Court has held that the recognition of the validity of the payment of a tax claim to a wrong account only within a period of 1 year, calculated from the date of payment, with the consequence that for exceeding that period the taxpayer is obliged to pay additional tax claims [therefore, within the meaning of Article 139 para. (1) of the Constitution on the power of the legislature to establish the State budget revenues] constitutes a disproportionate restriction of the right to private property (Decision no. 270 of 7 May 2014, para. 15-26). Similarly, the condition imposed on the successful tenderer in that it can acquire the right to property solely upon payment of the tax on the transfer of immovable property owned by the debtor [therefore, within the meaning of Article 139 para. (1) of the Constitution on the legislature's right to lay down the State budget revenues] constitutes a disproportionate restriction of the right to property of the successful tenderer (Decision no. 662 of 11 November 2014, para. 22-41).

[58] The Court has established that the disadvantages resulting from the obligation imposed on the parties, natural or legal persons, to attend the information session on the advantages of mediation, on pain of inadmissibility of the application exceed [therefore, within the meaning of Article 126 para. (2) of the Constitution on establishing the court proceedings] the advantages of this measure, which translates in the breach of free access to justice (para. 23-25). The condition regarding the obligation incumbent on natural and legal person, parties to an appeal procedure, to have their application formulated and their case pleaded by a lawyer or legal adviser, as the case may be, [therefore, within the meaning of Article 126 para. (2) of the Constitution on establishing the court proceedings] constitutes a disproportionate restriction of the right of free access to justice (Decision no. 462 of 17 September 2014, para. 24-50, and Decision no. 485 of 23 June 2015, para. 28-30). However, the application of the procedure of regularisation of the writ of summons in administrative matters is a proportionate condition of access to justice (Decision no. 762 of 18 December 2014, para. 15, 16).

[59] The limitation of the right of disposition over a plot of land on which there is a dispute with regard to the title [ordered therefore pursuant to Article 1 para. (3) of the Constitution, as the civil circuit certainty is a prerequisite of the rule of law] is a proportionate restriction of the right to private property (Decision no. 539 of 15 October 2014, para. 14-31).

[60] The normative restriction of the right to property in order to carry out an activity, usually economic, on the neighbouring property [therefore, within the meaning of Articles 44 para. (7) and 45 of the Constitution] is a proportionate restriction both of the right to private property and of the right to personal, family and private life (Decision no. 692 of 27 November 2014, para. 16-27).

[61] The limitation of the right of use under which the holders of the right to property over grassland are obliged to maintain them in this category of use in order to preserve the grassland's flora composition [therefore, within the meaning of Article 44 para. (7) of the Constitution on the protection of the environment] represents a proportionate restriction of the right to private property (Decision no. 13 of 15 January 2015, para. 28-30).

[62] Published in Official Gazette of Romania, Part I, no. 653 of 4 September 2014.

proportionality "formula" used by the European Court given the identity of the criticisms and problems raised in relation to the regulatory subject-matter of the national law, namely the law transposing Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC[63]. Thus, this proportionality test carried out by the Court has maintained the same standards/requirements that characterise, from a material point of view, the classic theory of the principle of proportionality.

We note that, in other decisions, the Court used a default application of the principle of proportionality in its reasoning by reference to the Latin adage *est modus in rebus*, namely the condition of reasonableness, therefore, a simplified variant of the proportionality test, which however maintains its elements. We have in mind Decision no. 501 of 30 June 2015[64] and Decision no. 680 of 26 June 2012[65], where the Court examined the legislature's discretion to regulate the conditions for entitlement to a pension for magistrates and persons with disabilities in relation to the normative content of the right to pension.

From the above, it is clear that the constitutional problems encountered were related to the fair balance between the competing interests, namely the actual proportionality of the measure. However, the Court has not neglected in its analysis the other two elements of the test, *i.e.* the suitability and the necessity; thus, in its case-law, it found an infringement of the necessity of the interference with the right to private property, stating, for example, that the penalty imposed on the successful tenderer, in the sense of restriction of its right to property where the debtor fails to pay the tax on transfer of immovable property, is not necessary, since the legislature has the possibility to regulate other ways to achieve the right of claim against the seller subject to forced execution, without in any way or another place a condition on the successful tenderer, who is a third party to the existing tax law relationship between the State and the seller subject to forced execution[66].

Likewise, it is worth mentioning also the Constitutional Court Decision no. 768 of 18 December 2014[67], whereby the Court examined the constitutionality of some objective conditions of restriction on economic freedom, namely the establishment of pharmacies in urban areas, according to the rank and the number of inhabitants of cities, with reference to the Decision of the German Federal Constitutional Court dated 11 June 1958 – BVerfG 7, 377 – *Apothekenurteil*. Although not expressly stated, the Court applied in fact the theory of steps, by justifying the need to use this "final" step of limitation of economic freedom, so that, in our view, reliance upon the principle of proportionality could be omitted.

[63] Published in the Official Journal of the European Union L 105 of 13 April 2006.
[64] Published in Official Gazette of Romania, Part I, no. 618 of 14 August 2015.
[65] Published in Official Gazette of Romania, Part I, no. 566 of 9 August 2012.
[66] Decision no. 662 of 11 November 2014, *cited above*, para. 35.
[67] Published in Official Gazette of Romania, Part I, no. 154 of 4 March 2015.

4. Conclusions

The reception of the principle of proportionality, a principle of German origin, in the case-law of the Constitutional Court of Romania must be accompanied by a correct implementation thereof in order to prevent any tampering with its purpose and objectives, *i.e.* to create and support a balance between colliding constitutional rights/freedoms and principles. Therefore, there must be a conceptual delimitation between the principle of proportionality which inherently accompanies the normative content of the right and the principle of proportionality referred to in Article 53 of the Constitution which concerns the exceptional situations which may arise in the constitutional life of the Romanian State. Accordingly, at the level of the case-law of the Constitutional Court, it is necessary to adopt a shared vision of this principle, otherwise the uncertainty of the constitutional analysis would have undesirable effects on the unity of the case-law.