

# THE PRINCIPLE OF PROPORTIONALITY REFLECTED IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF ROMANIA AND THE CONSTITUTIONAL COUNCIL OF FRANCE

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## Abstract

*In this study, we aim to analyze the main characteristics of the proportionality test reflected through the jurisprudence of the constitutional courts in Romania and France. The identification of these elements aims at establishing three coordinates: the common elements of the evolution of the proportionality test, the way of systematization of the current constitutionality control over proportionality and the evolutionary perspectives in the proportionality test. The determination of jurisprudential variations has the role of marking the common points, the divergent ones, and the aspects of complementarity from the constitutional perspective, respectively. We also consider specific issues regarding the jurisprudence of the European courts, as well as how it interferes with the proportionality tests of the two constitutional courts. Also, the option for the two institutions is justified by the fact that they have common elements and a tangential evolution, aspects that can be captured more clearly from the analysis of the principle of proportionality, given that it is a generally accepted concept, but nuanced in practical terms.*

**Keywords:** *necessary character; adequacy; limited proportionality; unconstitutionality; interference*

## 1. Constitutional literature and jurisprudence

The principle of proportionality has its origins in German law and is developed through the case law of the Constitutional Courts, the European Court of Human Rights and the Court of Justice of the European Union. Proportionality finds its applicability in reconciling the interest of public power and the protection of fundamental rights and freedoms, a balance between converging interests and values. The European Convention on Human Rights establishes in art. 8-11 the conditions under which the exercise of certain rights which are protected may be restricted,

meaning that, on the one hand, the necessity of such measures is expressly provided for and, on the other hand, the measures must be justified. For example, justification could be represented by national security, national defense, and public order<sup>1</sup>. Based on the same reasoning, art. 52 para. (1) of the Charter of Fundamental Rights of the European Union regulates in principle the idea of proportionality. Also, art. 5 para. (4) of the Treaty on European Union establishes the obligation of the principle of proportionality in the relations between the Union and the Member States, and the provisions of art. 276 of the Treaty on the Functioning of the European Union excludes the competence of the Union as regards “the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.

Proportionality regards the conciliation between the general interests of society and the particular ones. However, achieving proportionality is more than that. The general interests are a sum of the particular ones but in an approach *in abstracto*; what determines the principle of proportionality to balance the interests *in abstracto* with those *in concreto*, by relating the norm to a particular case<sup>2</sup>. The reasoning is based on the idea that fundamental rights and freedoms are guaranteed in concrete terms, so reporting to the norm must be done in the same way. On this fact, the French doctrine has highlighted that, through the proportionality control, the balance of interests is restored at the moment when the law is applied, and not only at its regulated<sup>3</sup>.

The concept of proportionality has its origins in the term *analogy*, having been initially applied in distributive justice<sup>4</sup> and captures a balance between the interests of the recipients of the rule and the power of the state to enforce it or in other words, the need of a fair balance between violations of fundamental rights or freedoms and the general interest<sup>5</sup>.

The principle of proportionality was also understood as a relation between two or more elements, and to establish the proportion it was necessary to determine a

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<sup>1</sup> In the literature there were presented the elements that determine the variation of proportionality control in the jurisprudence of the ECHR, as follows: the margin of appreciation of proportionality is related to the nature of law, the objective or subjective nature of the purpose of the rule and the consensus of states. In this sense, see M. Colombine, A. Schahmaneche, *La Cour européenne des droits de l'homme, in L'élaboration des décisions des cours constitutionnelles et européennes «Recherche réalisée avec le soutien de la Mission de recherche Droit et Justice»*, 2017, p. 303, available at [www.gip-recherche-justice.fr/publication/view/lelaboration-des-decisions-des-cours-constitutionnelles-eteuropeennes-2](http://www.gip-recherche-justice.fr/publication/view/lelaboration-des-decisions-des-cours-constitutionnelles-eteuropeennes-2), accessed on March 25, 2021. At the same time, there is also a support for the balance of the vision between the jurisprudence of the Constitutional Council and the ECHR; for examples, see O. Dutheillet de Lamothe, *Le Conseil constitutionnel et le droit européen*, in *Revue française de droit constitutionnel*, no. 57/2004, pp. 31 and 33.

<sup>2</sup> H. Fulchiron, *Flexibilité de la règle, souplesse du droit*, in *Recueil Dalloz Review*, n. 24/2016, p. 1376.

<sup>3</sup> *Ibidem*.

<sup>4</sup> A.N. Georgiadou, *Le principe de la proportionnalité dans le cadre de la Jurisprudence de la Cour de Justice de la Communauté Européenne*, in *Archives for Philosophy of Law and Social Philosophy*, vol. 81, nr. 4/1995, p. 533.

<sup>5</sup> J. de Guillenchmidt, *Le contrôle du principe de proportionnalité dans la jurisprudence du Conseil constitutionnel français*, ACCPUF – Bulletin n. 9/2010, p. 27.

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balanced result<sup>6</sup>; and the control of the norm is more rigid when the norm aims at an imperative objective<sup>7</sup>.

In the French Constitution, the principle of proportionality is not expressly regulated but represents a mechanism of the court for balancing public and private interests. In comparison, the Romanian Constitution enshrines in art. 53 para. (2) the principle of proportionality, determining the conditions for such a measure; the restriction of the exercise of fundamental rights or freedoms “shall only be ordered, if necessary, in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom”. The French Constitutional Council also ruled in the same way, noting that the restriction of individual liberty is permitted to the extent necessary and proportionate to the objectives pursued, and it is for the legislator to reconcile restrictive measures applied to persons with mental disorders that represent a danger for public order and respect for the exercise of constitutional freedoms by such persons<sup>8</sup>. Reconciling fundamental rights and freedoms with the public interest requires a balanced approach that reflects the guarantees provided for by the legislator, meaning that the establishment of proportionality can also be achieved by comparing such guarantees with the aims pursued<sup>9</sup>. Also, even if the court decides to establish the constitutionality of the regulation, the proportionality analysis can provide solid indications for the courts called to rule in a case concerning those provisions.

Returning to the regulation of the constitutional basis for the restriction of fundamental rights and freedoms, we agree with a doctrinal opinion that states, justifiably, the fact that we cannot refer exclusively to the provisions of art. 53 para. (2) of the Romanian Constitution because they are applicable only in the context of exceptional situations, usually, the limitations regarding the exercise of fundamental rights and freedoms must be related to the constitutional text that regulates them<sup>10</sup>. For these reasons, we appreciate that the proportionality check will involve other reporting limits, depending on the exceptional or ordinary nature in which such limitations operate.

The principle of proportionality appears in the case of the control exercised by a court over a rule, thus verifying whether it produces disproportionate effects concerning fundamental rights. The principle of proportionality appears to be a filter

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<sup>6</sup> *Ibidem*.

<sup>7</sup> F. Malhière, *Rapport comparative, in L'élaboration des décisions de s cours constitutionnelles et européennes «Recherche réalisée avec le soutien de la Mission de recherche Droit et Justice»*, 2017, p. 50, available at [www.gip-recherche-justice.fr/publication/view/lelaboration-des-decisions-des-cours-constitutionnelles-et-europeennes-2](http://www.gip-recherche-justice.fr/publication/view/lelaboration-des-decisions-des-cours-constitutionnelles-et-europeennes-2), accessed at March 25, 2021.

<sup>8</sup> See para. 6 of Judgement n. 2013-367 QPC of February 14, 2014.

<sup>9</sup> See para. 8 of Judgement n. 2003-467 DC of March 13, 2003, and para. 6 of Judgement n. 2010-55 QPC of October 18, 2010.

<sup>10</sup> M.-M. Pivniceru, K. Benke, *Receptarea principiului proporționalității în jurisprudența Curții Constituționale a României. Influențele constituționale germane*, in *Revista de Drept Constituțional* nr. 1/2015, pp. 63-67.

phase capable to prevent a possible conviction of the state before the European Court of Human Rights, or, in other words, represents an adaptation to the European jurisprudence. On the other hand, the Convention and the jurisprudence of the Court take precedence over the national legal framework, which creates the obligation for the judge to apply the proportionality criteria of the Strasbourg Court as a matter of priority.

The application of the principle of proportionality is not done in isolation, but by reference to other rules or general principles of law. However, it is necessary to take into account the adaptability of proportionality, in that it depends on the geographical, temporal, social, economic context to which it is applied<sup>11</sup>. Also, the analysis of proportionality undertakes a reporting, because only between distinct components can it be established whether or not that balance exists, reasoning that determined in the German doctrine a controversy based on the establishment of the term of reference; in other words, if in the analysis of the proportionality the constitutional judge relates to fundamental rights and freedoms, there is a connection between them, or on the contrary, there is not necessarily such a connection, the two perspectives being called "the thesis of necessity", respectively "the thesis of contingency"<sup>12</sup>.

The French literature has identified three hypostases for the application of the principle of proportionality: a means of reporting between competing constitutional principles, which may be in conflict; a way to determine the observance of a constitutional principle, respectively when the principle of proportionality is *per se* a constitutional principle<sup>13</sup>.

A common point between the types of solutions pronounced by the French Constitutional Council and the Romanian Constitutional Court concerns *decisions subject to interpretation* or interpretative decisions, both constitutional courts using this type of solution to "save" that part of the norm, which corresponds to the meaning provided for by the court<sup>14</sup>. This way of individualizing the solution is considered by the French literature to be a partial test of proportionality, in the sense that the constitutional court cannot carry out a complete control of proportionality, at which point it will instruct the courts to "complete" this control by applying the law in a way that does not contravene fundamental rights and freedoms<sup>15</sup>. Applying the same reasoning, the reservation of interpretation also concerns the legislator, who must regulate following the decision of the constitutional court<sup>16</sup>.

In addition to what has been stated above and with the mention that it represents a hypothesis that may be incidental also regarding the decisions of

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<sup>11</sup> F. Rouviere, *Existe-t-il une méthode du contrôle de proportionnalité?*, in *Revue Justice Actualités*, ENM, n. 24/2020, p. 40.

<sup>12</sup> R. Alexy, *Constitutional rights and proportionality*, in *Journal for Constitutional Theory and Philosophy of Law*, n. 22/2014, p. 51.

<sup>13</sup> B. Mathieu, M. Verpeaux, *Contentieux constitutionnel des droits fondamentaux*, Ed. LGDJ, 2002, p. 484, *apud* J. de Guillenchmidt, *op. cit.*, p. 27.

<sup>14</sup> T. Toader, M. Safta, *Curs de contencios constitutional*, Hamangiu Publishing, Bucharest, 2017, p. 322.

<sup>15</sup> J. de Guillenchmidt, *op. cit.*, p. 33.

<sup>16</sup> *Ibidem*.

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unconstitutionality referring to the criterion of proportionality, we note that there is a distinction to be made regarding the moment when a decision takes effect. Thus, the second paragraph of art. 62 of the French Constitution provides that "a provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision"<sup>17</sup>. A decision of unconstitutionality with delayed effect is not regulated by the Romanian Constitution<sup>18</sup>.

The principle of proportionality derives from the German jurisprudence, where it is associated with a review of the objective pursued by the legislator. That reasoning has also been adopted by the French case law, meaning that restrictions on the exercise of fundamental rights and freedoms are subject to control of the pursued objective<sup>19</sup>. However, subsequent decisions were distinguished by a separation of the proportionality test from the objective test<sup>20</sup>.

## **2. Methods of differential application of the principle of proportionality<sup>21</sup>**

### ***2.1. Comprehensive review***

To begin with, we intend to make some brief clarifications regarding the evolution of the degree of control exercised in the matter of proportionality assessment. The Council initially agreed to apply the proportionality test according to the priority or secondary rank of the right or freedom which was subject to a restriction. Priority rights require increased protection, any limitation must be justified by reference to new constitutional guarantees, and secondary rights benefit from a restricted protection and are analyzed from the perspective of proportionality in relation to a general interest<sup>22</sup>.

The elements of the principle of proportionality, as they have been understood from the German jurisprudence, are adequacy, necessity and limited proportionality<sup>23</sup>. The three elements were noted in this form in the jurisprudence of the Council

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<sup>17</sup> For example, see para. 30 of Judgement n. 2010-14 QPC of July 30, 2010.

<sup>18</sup> Following art. 147 para. (1) and (4) of the Romanian Constitution.

<sup>19</sup> V. Goesel-Le Bihan, *Le contrôle de l'objectif poursuivi par le législateur dans la jurisprudence récente du Conseil constitutionnel*, in *Revue française de droit constitutionnel* n. 98/2014, p. 272 and the jurisprudence referenced at footnote n. 12.

<sup>20</sup> *Ibidem*, pp. 272 and 281.

<sup>21</sup> J. de Guillenchmidt, *op. cit.*, p. 30.

<sup>22</sup> V. Goesel-Le Bihan, *Le contrôle de l'objectif poursuivi par le législateur dans la jurisprudence récente du Conseil constitutionnel*, *op. cit.*, p. 270.

<sup>23</sup> See J. de Guillenchmidt, *op. cit.*, p. 31, and A. Chauvet, *Le contrôle de proportionnalité mis en œuvre par le juge judiciaire à la lumière du droit constitutionnel. Réflexions au regard du principe de séparation des pouvoirs et du principe d'égalité devant la loi*, in *Revue Justice Actualités*, ENM, n. 24/2020, p. 30. Similarly, the three subprinciples can be found as well in the German literature and jurisprudence, for this see R. Alexy, *op. cit.*, p. 52, and M.-M. Pivniceru, K. Benke, *op. cit.*, p. 55, and in the Swiss jurisprudence, respectively, see D. Ivanov, *La proportionnalité des actes normatifs*, in *Jusletter*, n. 24/2016, p. 4.

starting with the Decision no. 2008-582 of 21 February 2008. The statement of reasons for this decision was criticized on the grounds that it did not represent a genuine control of proportionality over the substance of the rule, but concerned an inventory of procedural guarantees - in other words, it was verified whether affecting the liberties has been compensated by sufficient guarantees<sup>24</sup>. The initiative to adhere to the tripartite structure of the principle of proportionality has led to different forms of applicability, where only one adequacy control and one on necessity have been distinguished<sup>25</sup>. As we shall see, the current jurisprudence<sup>25</sup> of the Council shows an orientation that reflects the three elements of proportionality, as understood from the jurisprudence of the German constitutional court.

The adequacy refers to the analyzed measure that is susceptible to determine or to facilitate the achievement of the concerned objective.

The necessity implies setting an upper limit so that the measures do not exceed what would be sufficient to achieve the objective or, if there are other methods that would respect the necessity, the legislator is bound to respect them<sup>26</sup>. In the light of necessity, the proportionality is analyzed in terms of establishing the balance between fundamental rights, in this sense the Parliament having the duty to standardize the guarantees granted to citizens for the exercise of the fundamental freedoms.

Finally, proportionality, *stricto sensu*<sup>27</sup>, means that the obligations created are not disproportionate to the desired result, in other words, the measures that provide the best protection should be opted for, measures that imply the least interference in the field of rights and fundamental freedoms<sup>28</sup>. Therefore, the conflict between the principles of law implies the necessity for balance and optimization in relation to the normative provisions<sup>29</sup>.

We note that the analysis of the three elements<sup>30</sup> that regard the proportionality test involves going through them in the order of their enumeration. Thus, the lack of

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<sup>24</sup> R. Boust, *Contrôle constitutionnel de proportionnalité. La spécificité française à l'épreuve des évolutions récentes*, in *Revue française de droit constitutionnel*, n. 4/2011, pp. 924-926, and G. Chetard, *La proportionnalité de la répression dans la jurisprudence du Conseil constitutionnel*, in *Revue de science criminelle et de droit pénal comparé*, n. 1/2013, p. 62.

<sup>25</sup> V. Goesel-Le Bihan, *Le contrôle de l'objectif poursuivi par le législateur dans la jurisprudence récente du Conseil constitutionnel*, *op. cit.*, pp. 288-292.

<sup>26</sup> R. Alexy, *op. cit.*, p. 53, including the mentions made at reference note 8, and A. Flückiger, *(Re-) faire la loi: Traité de légistique à l'ère du droit souple*, Ed. Stämpfli Editions, Berna, 2019, p. 470.

<sup>27</sup> It was also named "balancing test", L.B. Tremblay, *An egalitarian defense of proportionality - based balancing* in *International Journal of Constitutional Law*, vol. 12, n. 4/2014, p. 865. The referenced author noted that this stage is controversial, with two perspectives: "priority of rights model" and the "model of optimization of values in conflict".

<sup>28</sup> V. Goesel-Le Bihan, *Le contrôle de proportionnalité exercé par le Conseil constitutionnel*, in *Cahier du Conseil Constitutionnel* n. 2/2007, available at [www.conseil-constitutionnel.fr/node/3108/pdf](http://www.conseil-constitutionnel.fr/node/3108/pdf), accessed at March 24, 2021.

<sup>29</sup> R. Alexy, *op. cit.*, p. 54.

<sup>30</sup> In literature, some opinions identify four elements: adequacy, rational limitation, necessity and proportionality *stricto sensu*. A.L. Bendor, T. Sela, *How proportional is proportionality?*, in *International Journal of Constitutional Law*, vol. 13, n. 2/2015, p. 531.

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adequacy means that the regulation is not able of achieving the objective pursued; in this case the verification of the necessity or proportionality in the narrow sense is no longer justified. However, if the regulation is adequate, the second stage of the necessity is followed, in which the constitutional judges are to determine whether the rule does not exceed, for example, the limit of interference with fundamental rights or freedoms. The third stage aims to verify the proportionality in a narrow sense, e.g. to establish the balance between the obligations it generates and the purpose it pursues<sup>31</sup>. The same reasoning was adopted by the Romanian Constitutional Court in a reference decision that enshrines the beginning of the proportionality analysis based on the three criteria in national jurisprudence; so the court notes that "any measure adopted must be adequate – able to objectively achieve the purpose, necessary – does not exceed what is necessary for the fulfilment of the purpose and proportional – corresponding to the purpose pursued. For the correct application of the test, it is necessary to examine each of the 3 elements in that order (...). Thus, to perform the proportionality test, the Court must first establish the purpose pursued by the legislator by the measure criticized and whether it is legitimate, as the proportionality test can only relate to a legitimate aim"<sup>32</sup>. Basically, by this decision, the court proposes the analysis of proportionality in two stages: the first stage in two steps that we can identify as the filter phase in which it is analyzed the existence of a limitation of the exercise of a fundamental right or freedom and whether a legitimate aim is pursued, and in the second stage, the adequacy, necessity and proportionality themselves are analyzed in this order.

This triple test of proportionality, based on the three elements presented above, has a thorough jurisprudence of the Constitutional Council. It should also be mentioned that there was a transition period, as initially the proportionality control was limited to what is adequate and necessary. Thus, in a reference decision<sup>33</sup>, the Council was called upon to rule on the constitutionality of the law on detention after serving a sentence of at least fifteen years for persons suffering from a mental disability and having committed an act of murder, torture, rape or abduction of an underaged victim. As to the adequacy, the Council held, on the one hand, that the

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<sup>31</sup> M.-M. Pivniceru, K. Benke, *op. cit.*, p. 69. The authors note that "such order of analysis reflects the intervention of the Court, namely a minimum intervention which characterizes the adequacy to a maximum intervention that regards the appreciation of the just balance between competitive interests".

<sup>32</sup> See Judgement of the Constitutional Court of Romania n. 266 of May 21, 2013, published in the Official Journal of Romania n. 443 of July 19, 2013. Translation from the judgement: „orice măsură luată trebuie să fie adecvată – capabilă în mod obiectiv să ducă la îndeplinirea scopului, necesară – nu depășește ceea ce este necesar pentru îndeplinirea scopului și proporțională – corespunzătoare scopului urmărit. Pentru corecta aplicare a testului este necesară examinarea fiecăruia dintre cele 3 elemente în ordinea respectivă (...). Astfel, în vederea realizării testului de proporționalitate, Curtea trebuie, mai întâi, să stabilească scopul urmărit de legiuitor prin măsura criticată și dacă acesta este unul legitim, întrucât testul de proporționalitate se va putea raporta doar la un scop legitim”.

<sup>33</sup> Para. n. 17-23 of Decision n. 2008-562 DC of February 21, 2008. Hélène Surrel, *Chronique Conseil constitutionnel et jurisprudence de la CEDH (janvier 2020 à juin 2020)* in *Chronique Conseil Constitutionnel et Jurisprudence de la CEDH*, nr. 5/2020, available at [www.conseil-constitutionnel.fr/node/21778/pdf](http://www.conseil-constitutionnel.fr/node/21778/pdf), p. 5.

gravity of the act and the condition of the convicted person required such a measure, the legislator regulating the offences for which the measure may be applicable, respectively the legislator has created sufficient guarantees through the fact that before the sentence to be considered as executed, at least six weeks before, the convict has been transferred to a medical unit for evaluation. The necessity is emphasized by the Council in that the regulated measure fulfils this condition if *no other less restrictive measure could provide sufficient guarantees to prevent the other acts which would endanger the safety of others*. The Council considered that failure to carry out prior procedures for medical observation and adequate treatment during the period of detention justifies the need concerning the aim pursued. Regarding the strict proportionality, the aim is to provide elements that do not allow a disproportionate extension of the effects of the measure in question. In this respect, the existence of a procedure before the court, the obligation of legal aid, the availability of an appeal and the annual reassessment of persons before the competent court led the Council to consider that the regulation of the possibility of unlimited renewal of the measure is not disproportionate of strict necessity.

The principle of proportionality, in its narrow sense, has been further developed by CCR Decision n. 279 of April 23, 2015<sup>34</sup>. The Court was called upon to determine whether the suspension of the individual employment contract as a result of the employer's prior complaint against the employee was a proportionate measure concerning the restriction on the exercise of the right to work. Going through the first preliminary stage of verifying the proportionality enshrined in the Decision n. 266/2013<sup>35</sup>, the Court shows first of all the legality and justification of the restrictions. The second stage involves the analysis of the adequacy and necessity of the restrictions, and from the employer's perspective they appear to be justified on the one hand because through their activity, the employee can draw negative consequences in the employer's economic activity, and on the other, it seems that the necessity is justified by ensuring the protection of the employer's interests. Focusing on the assessment of proportionality in a narrow sense, the Court is to compare the employer's right to protection of his economic interests with the employee's right to work. In essence, the Constitutional Court notes in the first stage that the decision to suspend the individual employment contract is left to the exclusive discretion of the employer, and secondly, it considers that the post-suspension measures are not in accordance with the proportionality principle, "the measure being excessive in comparison to the objective to be achieved"<sup>36</sup>.

Finally, we note that the analysis of proportionality in relation to the three stages mentioned above was not without criticism; the main problems that may occur have

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<sup>34</sup> Published in the Official Journal of Romania, n. 431 of June 17, 2015.

<sup>35</sup> In its decision n. 279/2015, the Court has broadened the interpretation of the terminology on the proportionality elements, referring to adequacy and necessity, and proportionality, respectively, generating a dichotomy of the principle of proportionality. However, proportionality still is interpreted *stricto sensu*.

<sup>36</sup> Para. n. 31, 32 and 35-37 of Decision of CCR n. 279 of April 23, 2015.



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been indicated: the analysis involves subjectivism and interdisciplinarity; the risk of automatism in applying the three stages, respectively their insufficiency in certain situations, such as when the norm appears proportional concerning one of its purposes, but not in relation to others<sup>37</sup>.

#### **2.2. Restricted control**

Restricted control is based on the reasoning that the case law of the Council must be limited to the point where it risks ruling on the appropriateness of a norm, in other words, it is the legislator's right and obligation to determine the best means to achieve the purpose. In essence, the Council's role is to analyze Parliament's materialized will by law, and not its intended purpose<sup>38</sup>. Therefore, the Constitutional Council considered that art. 61-1 of the French Constitution<sup>39</sup> does not provide the Council with a general power of assessment and decision, similar to that exercised by the Parliament, which has the role of determining whether the legal provisions subject to examination are following the rights and freedoms regulated by the constitution. The Council aimed to establish proportionality regarding the deprivation of citizenship of persons convicted of an offence involving an act of terrorism<sup>40</sup>.

### **3. Comparative jurisprudential considerations regarding the evaluation of the proportionality criterion**

The main jurisprudential benchmarks we used to analyze the principle of proportionality are limited to the matter of necessary restrictions, the matter of restrictions on the exercise of fundamental rights and freedoms, and the matter of establishing the balance between constitutional rights and freedoms, respectively.

Thus, in a case before the Council, it was necessary to strike a balance between the protection of public order and the identification and detention of perpetrators, which assumes a conflict between the protection of the main constitutional values embodied by public order and the respect for privacy<sup>41</sup>. Also, the recognition of a right, such as the right to strike, does not prevent its restriction, if this measure justifies the preservation of another right, such as ensuring the continuity of public services.

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<sup>37</sup> D. Ivanov, *op. cit.*, pp. 5-7.

<sup>38</sup> J. de Guillenchmidt, *op. cit.*, p. 32.

<sup>39</sup> Art. 61-1 of the French Constitution: "If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period. An Institutional Act shall determine the conditions for the application of the present article". Șt. Deaconu (coord.), *Codex constituțional. Constituțiile statelor membre ale Uniunii Europene*, vol. I, Ed. Monitorul Oficial, București, 2015, p. 655.

<sup>40</sup> Para. n. 18 of Decision n. 2014-439 QPC of January 23, 2015.

<sup>41</sup> Para. n. 76 of Decision n. 2004-492 DC of March 2, 2004.

Moreover, the Constitutional Council noted that, in the event of such conflicts between constitutional values, they could lead to limitations in prohibiting the exercise of certain rights if there is a general interest, such as meeting the essential needs of the country, to require it<sup>42</sup>. In the same sense, we also take into account the CCR Decision n. 1282 of October 12, 2010<sup>43</sup>, which without explicitly mentioning the principle of proportionality refers to the delimitation framework and the degree of interference that can be brought to the right to privacy, thus "intimate, family and private life is protected by law under which it manifests itself within the legal order, and not outside it. The right of disposal of one's person, not being an absolute right, can be exercised only with respect for the rights of other persons, public order and good morals. In this sense, the Convention for the Protection of Human Rights and Fundamental Freedoms establishes in Article 8 point 2 that the right to respect for privacy may be subject to restrictions if they are provided by law and if they constitute necessary measures in a democratic society for national security, public safety, the economic well-being of the country, the defense of order and the prevention of criminal acts, the protection of health or morals or the protection of the rights and freedoms of others"<sup>44</sup>.

The proportions between the fundamental values suffer a possible accentuated disproportion when the holders are different. Similar to the previous example, we consider divergences of interests between the state and individuals. Another decision of the French Constitutional Council raised the issue of establishing the proportionality relation in terms of information collection techniques. Such an area reflects the major interests of the state related to integrity, independence, national defense, economic interests, prevention of possession and use of weapons of mass destruction – in other words, a regulatory framework that addresses, among other things, the elements of national security. On the other hand, the interests of individuals aim for the respect for privacy and freedom of expression. In this context, the elements of proportionality covered by the Council's recitals are limited to establishing a fair balance. Therefore, in terms of adequacy, the legislator must regulate in sufficient detail what the aims are pursued and according to what criteria are set<sup>45</sup>. The necessity can be met by setting limits on interference in private life, limits which can be individualized, for example in the case of collecting information from members of the Parliament, magistrates, lawyers or journalists, where it is justified to implement derogating procedures from the general framework<sup>46</sup> – the hypothesis that is justified by the profile of the activity

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<sup>42</sup> Decision n. 79-105 DC of July 25, 1979.

<sup>43</sup> Published in the Official Journal of Romania n. 738 of November 4, 2010. See, also, *Raportul Curții Constituționale a României*, available at [www.cecc20172020.org/fileadmin/Dokumente/Pdf/Questionnaire/National\\_Reports/National/Romania\\_-\\_Questionnaire\\_XVIII\\_Congress\\_of\\_CECC.pdf](http://www.cecc20172020.org/fileadmin/Dokumente/Pdf/Questionnaire/National_Reports/National/Romania_-_Questionnaire_XVIII_Congress_of_CECC.pdf), p. 17.

<sup>44</sup> Para. 45 of Decision of CCR n. 204 of March 31, 2015, published in the Official Journal of Romania n. 430 June 16, 2015.

<sup>45</sup> Para. 10 of Decision n. 2015-713 DC of July 23, 2015.

<sup>46</sup> Para. 31 and 51 of Decision n. 2015-713 DC of July 23, 2015.

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in these fields. Electronic mail interception techniques are also considered proportionate to interference with privacy, insofar as they are under strictly regulated purposes and guarantees, and to the obligation of the authority to oversee that, in so far as it finds that the evidence collected does not relate to the intended purpose, they must be destroyed within a set time<sup>47</sup>.

We also note that the compliance with the principle of proportionality extends to procedural guarantees in the field of information collection techniques. Thus, the Constitutional Court of Romania ruled in its Decision no. 244 of June 6, 2017<sup>48</sup>, that “the existence of an *a posteriori* control that takes into account these aspects is a guarantee of the right to privacy, which outlines and, in addition to the other elements necessary and recognized at the constitutional level and conventionally, determines the existence of the proportionality between the ordered measure and the aim pursued, as well as its necessity in a democratic society”<sup>49</sup>. Specifically, the Court established that persons subject to technical supervision measures, other than the defendant, are entitled to a procedure to verify the legality of this measure.

From the clarifications above, it follows that, in establishing proportionality, the core of constitutional values is taken into account, as we note the imperative of national security as long as it is subject to clearly defined criteria, purposes and procedures, prevails over particular interests. A similar situation is represented by the possibility that in the context of a state of emergency, a person suspected of posing a threat to security and public order may be placed under house arrest or associate the measure with the obligation to remain in a certain place of residence<sup>50</sup>. The Constitutional Council established that such a regulation is in accordance with the provisions of art. 66 of the French Constitution<sup>51</sup>, if it regulates a maximum reasonable duration of the measure<sup>52</sup>, if there are grounds to consider that the person may pose a threat to security and public order, which is the only purpose of such a measure, respectively the measure may be applied only in the territory where

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<sup>47</sup> Para. 65-67 of Decision n. 2015-713 DC of July 23, 2015.

<sup>48</sup> Published in the Official Journal of Romania n. 529 of July 6, 2017.

<sup>49</sup> Para. 64 of the Decision of CCR n. 244/2017.

<sup>50</sup> Para. 4-7 of the Decision n. 2015-527 QPC of December 22, 2015.

<sup>51</sup> Art. 66 of the French Constitution: “No one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute”. Also refer to Șt. Deaconu (coord.), *op. cit.*, p. 657.

<sup>52</sup> In a similar hypothesis, the Constitutional Court of Romania established in its Decision n. 799 of June 17, 2011, published in the Official Journal of Romania n. 440 of June 23, 2011, without referring expressly to the principle of proportionality, that “withholding a person constitutes a major interference regarding the freedom of the person, and therefore, regulating the its maximum duration in a constitutional norm constitutes a real guarantee of the individual freedom. Regarding the duration of withholding, this is an issue of criminal policy of the state, that has to ensure a just balance between the imperative of the achievement of the general interests of the society and the defense of the legal order, by identifying and bringing to justice the persons subject to grounds of consideration that they have committed a criminal act or to believe in the necessity to prevent a crime from being committed or evading of the criminal once the crime has been committed, on the one hand, and the common interest in defending the rights of the individual, on the other hand, without affecting the substance of a person's right to freedom”.

the state of emergency is declared and, finally, the measure should not materialize in a technique in which several people are held together.

The context of the mentioned state of emergency also provided the Constitutional Court of Romania with the opportunity to outline the reporting framework to the principle of proportionality. Specifically, the Court states that when the state of emergency that regards the measure of quarantine results in a deprivation of freedom, it is necessary to ensure access to a court to “verify the conformity of the administrative act with the legal and constitutional provisions, but also to analyze the proportionality of the measure, in relation to the respective context”<sup>53</sup>.

Also concerning the right of access to justice, the Court was called upon to establish the proportionality between the right of free access to justice and the limitation imposed by the obligation to be represented or assisted by a lawyer in the stage of appeal. Thus, “the Court notes that the option of the legislator for this measure, given its finality, is necessary to achieve the pursued purpose. However, the Court notes that for the reasons set out below, this measure, as regulated, does not appear to be proportionate to the legitimate purpose pursued in the light of the relation between the invoked general interest and the individual interest. Thus, as regards to the existence of a fair balance between the measure which led to the restriction of the right of free access to justice and the legitimate purpose pursued, the Court finds that there is no reasonable relation of proportionality between the requirements of general interest the criticized legal provisions consecrating an imbalance between the two competing interests”<sup>54</sup>. Essentially, the Court notes that the legislator went beyond what is necessary by imposing an excessive rule by making the exercise of the appeal conditional on the existence of representation or assistance by a lawyer. Thus, as a matter of principle, we note that the objectives “subject to the intended purpose qualify the purpose of the regulation as legitimate if the limitation is reasonable in relation to the objective pursued and does not tend to transform this right into an illusory/ theoretical one”, reasoning that is verified through the proportionality test<sup>55</sup>.

We mentioned above that the three elements of the principle of proportionality involve a three-step verification corresponding to each element. However, we also find decisions in which the Council establishes a provision to be contrary to the Fundamental Law, showing it to not be adequate and proportionate in relation to the exception with which it has been invested in solving it<sup>56</sup>. The exception of unconstitutionality concerned incrimination in the French Criminal Code<sup>57</sup> which punished the act of usual accessing online sources of information through images or representations that

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<sup>53</sup> Para. 71 of Decision of CCR n. 458 of June 25, 2020, published in the Official Journal of Romania n. 581 of July 2, 2020.

<sup>54</sup> Para. 33, 34 and 50 of Decision of CCR n. 462 of September 17, 2014, published in the Official Journal of Romania n. 775 of October 24, 2014.

<sup>55</sup> Para. 28 of Decision of CCR n. 13 of January 15, 2015, published in the Official Journal of Romania n. 175 of March 13, 2015 and para. 29 of Decision of CCR n. 462 of September 17, 2014.

<sup>56</sup> Decision n. 2016-611 QPC of February 10, 2017. Also, refer to Decision n. 2020-845 QPC of June 19, 2020.

<sup>57</sup> Art. 421-2-5-2 of the French Criminal Code.

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encourage terrorist activity, so the provisions indicated were intended to prevent the indoctrination of persons who may commit acts of terrorism. Essentially, the court held, on the one hand, that the access to information and freedom of expression prevails in a democratic society, with the regulatory framework providing sufficient incriminations and an adequate procedural framework for preventing and sanctioning terrorist activities, which affects the nature of necessary incrimination. On these grounds, such regulation is inadequate in so far as the institutions having jurisdiction over national security have sufficient legal instruments, and the provisions of art. 421-2-5-2 of the French Criminal Code was not conditional on its application by the existence of evidence to certify that the person is motivated by illegal intentions<sup>58</sup>. The lack of adequacy was also justified by the unconditionality of the existence of indications that the person intended to commit acts of terrorism or to adhere to such an ideology. Also, the hypotheses governing causes of impunity, such as access to such data by persons entitled by the nature of their profession, were not sufficiently individualized, and as a result, they created a state of uncertainty regarding the application of the rule and caused inequality in the possibility to have access to information.

From the above decision, we note a relevant mention: the Council weighed individual rights and national security, context in which it considered that freedom of expression and communication represent a condition of democracy as well as the guarantee of respect for other fundamental rights and freedoms<sup>59</sup>. The same reasoning was also addressed in relation to the freedom of expression and communication through the press<sup>60</sup>. In addition to the limits of the right to freedom of expression, the Romanian Constitutional Court has established in principle that “the limits of freedom of expression fully agree with the concept of freedom, which is not and cannot be understood as an absolute right. The legal-philosophical conceptions promoted by democratic societies admit that the freedom of one person ends where the freedom of another person begins. In this sense, art. 57 of the Constitution expressly provides for the obligation of Romanian citizens, foreign citizens and stateless persons to exercise their constitutional rights in good faith, without violating the rights and freedoms of others”<sup>61</sup>.

We previously noted that the proportionality test involves a preliminary stage which consists of the analysis of the existence of a limitation of the exercise of a fundamental right or freedom. However, this control regards the existence of a clear, precise and predictable rule. In other words, the restriction on the exercise of fundamental rights and freedoms must satisfy the above conditions in advance<sup>62</sup>. For these reasons, we can note that if the exception of unconstitutionality concerns both

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<sup>58</sup> Para. 2 of Decision n. 2016-611 QPC of February 10, 2017.

<sup>59</sup> Para. 5 of Decision n. 2016-611 QPC of February 10, 2017.

<sup>60</sup> Decision n. 2013-319 QPC of June 7, 2013.

<sup>61</sup> Decision of CCR n. 649 of October 24, 2018, published in the Official Journal of Romania, n. 1045 of December 10, 2018.

<sup>62</sup> Para. 132 and 134 of Decision n. 152 of May 6, 2020, published in the Official Journal of Romania n. 387 of May 13, 2020.

the lack of clarity, precision and predictability of the rule, and the lack of proportionality, then the test of proportionality will not be performed in the hypotheses of the admission of the exception regarding the clarity, accuracy or predictability of the rule<sup>63</sup>. As example, we note that the legislative solution which conditioned the access to justice by the administrative settlement of the claims of interested parties within a successively extended period does not meet the condition of predictability of the rule, the Court noting the lack of proportionality between the purpose and the means adopted<sup>64</sup>.

#### 4. Conclusions

The control of proportionality unquestionably shows an evolution in the jurisprudence of the two constitutional courts that we have considered in this study. It also seems natural to admit that this development is largely determined by the jurisprudence of the German constitutional court and the European courts which have systematized and interpreted the elements of the principle of proportionality, this jurisprudence becoming a reference for the decisions of the national courts.

The test of proportionality plays a significant role both from the perspective of the courts and litigants, and the legislator, intending to establish a balance between opposing interests. However, the two constitutional courts will be faced with the necessity to establish clearer boundaries between what constitutes the elements of the test of proportionality and the control of the objective pursued by the legislator. In that regard, an approximation to the German jurisprudence could create the basis for a more robust jurisprudence in terms of the rigor of the factors analyzed to establish the conditions for proportionality.

The principle of proportionality has a jurisprudential context built on a different normative basis. For example, the French legislator, followed by the jurisprudence of the Council, established the proportionality of some incriminations regarding terrorism, an area in which both the Romanian legislation and jurisprudence are limited, especially in the field to of reference.

Another distinction is the frame of reference. In Romania, the stand of the Court on the review of constitutionality is made, first of all, to the Constitution, and later to the jurisprudence of the European courts; besides, the Declaration of the Rights of the Man and of the Citizen of 1789 is relevant in France.

On the one hand, the indicated jurisprudence showed that both the Romanian Constitutional Court and the French Constitutional Council have a common

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<sup>63</sup> Para. 50 and 51 of Decision of CCR n. 51 of February 16, 2016, published in the Official Journal n. 190 of March 14, 2016.

<sup>64</sup> Para. 33 and 37 of Decision of CCR n. 44 of January 31, 2017, published in the Official Journal of Romania n. 211 of March 28, 2017.

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foundation represented by the jurisprudence of the European and, especially German, courts, from where the tripartite structure of proportionality was adopted, represented by adequacy, necessity and limited proportionality. On the other hand, it is noted that in the jurisprudence of the Romanian Constitutional Court, the higher priority is given to the control of the objective pursued by the legislator. However, as stated in the French literature, efforts are being made to adopt a unified perspective on the steps proposed by proportionality control, and in this respect, an important role is played by the jurisprudence of the European courts, especially the European Court of Human Rights.

Another element of differentiation is represented by how the two courts relate to the objective pursued by the legislator, a perspective from which it ensures that the French Constitutional Council is more permissive in terms of performing the test of proportionality, provided that there are sufficient guarantees, the Constitutional Court of Romania counterbalances by prioritizing of what the susceptibility of the means to lead proportionately to the objective pursued refers to. Also, we did not identify in the analyzed jurisprudence any elements of reference that would initiate the hypothesis of multiple objectives, concerning the verification of proportionality. However, the closest means is represented by interpretative decisions, a concept adopted by the Romanian Constitutional Court, inspired from the French Constitutional Council.





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