THE PHILOSOPHICAL BASIS OF THE PRINCIPLE OF PROPORTIONALITY

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Abstract

The proportionality is a general principle of law, signifying the ideas of balance, justice, responsibility and the needed adequate suiting of the measures adopted by the State to the situation in fact and to the purpose aimed by the law.

The principle is expressly formulated in the European Union documents but also in the constitutions of other states. The normative or jurisprudential regulation of the principle explains the numerous preoccupations at scientific level to identify its dimensions. In this study, the principle of proportionality is analyzed from the perspective of the philosophy of the law, in order to try to identify its value dimensions that are to be found in the normative consecrations or in jurisprudence.

The normative of jurisprudential dimension of proportionality, as a law principle has its content in the concepts and philosophical categories that make up the contents of the principle of proportionality, in the law philosophy's main periods and currents.

We consider that such a scientific attempt is useful, having into consideration the importance of this principle for the contemporary law. The principle of proportionality is an important guaranty in the observance of the human rights, mainly in situations in which their exercising is being restricted by the actions ordered by state's authorities, being at the same time an important criterion to delimit the discretionary power from the power excess in the activity of state's authority.

In our opinion, only in the extent of our knowledge and understanding of the philosophical contents of this principle it is possible this one's correct applying in jurisprudence. This study is aiming to be a pleading for the possibility and usefulness of law's philosophy in this epoch dominated by juridical pragmatism and normativism.

Keywords: *proportionality, equity, idea of justice, lawful state, rational law, adequate relationship, freedom of action, margin of appreciation, just measure, principle of law, human rights*.

1. Introduction

The legal understanding of the principle of proportionality presents difficulties, because its content depends on a certain philosophical conception of justice. The legal doctrine, from antiquity to the present, evokes proportionality as meaning the idea of order, balance, rational relationship, fair measure.

Proportionality is not exclusively a principle of rational law, but at the same time, it is a principle of positive law, a principle of normative value. Thus, proportionality is a legal criterion that assesses the legitimacy of the interference of state power in the field of exercising fundamental rights and freedoms.

This principle is explicitly or implicitly enshrined in international legal instruments, or by the majority of the constitutions of democratic countries. The Romanian Constitution expressly states this principle in art. 53, but there are other constitutional provisions that imply it.

In constitutional law, the principle of proportionality is applied especially in the field of protection of fundamental human rights and freedoms. It is considered an effective criterion for assessing the legitimacy of the intervention of state authorities in the situation of limiting the exercise of certain rights. Moreover, even if the principle of proportionality is not expressly enshrined in the constitution of a state, doctrine and jurisprudence consider it to be part of the notion of the rule of law[1].

This principle is applied in several branches of law. Thus, in administrative law it is a limit of the discretionary power of the public authorities and represents a criterion for exercising the judicial control of the discretionary administrative acts. Applications of the principle of proportionality also exist in criminal law or in civil law.

The principle of proportionality is also found in European Union law, in the sense that the legality of Community rules is subject to the condition that the means used correspond to the objective pursued and do not go beyond what is necessary to achieve that objective.

The jurisprudence has an important role in the analysis of the principle of proportionality, applied in concrete cases. Thus, in the case law of the European Court of Human Rights, proportionality is conceived as a fair, equitable relationship between the factual situation, the means of restricting the exercise of certain

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[1] Petru Miculescu, *Statul de drept*, Lumina Lex Publishing House, Bucharest, 1998, pp. 87-88.

rights and the legitimate aim pursued or as a fair relationship between the individual interest and the public interest. Proportionality is a criterion that determines the legitimacy of the interference of the Contracting States in the exercise of the rights protected by the Convention.

In the same sense, the Constitutional Court of Romania, through several decisions, established that proportionality is a constitutional principle[2]. Our constitutional court stated the need to establish objective criteria, by law, for the principle of proportionality: "it is necessary for the legislature to establish objective criteria that reflect the requirements of the principle of proportionality"[3]. Therefore, the principle of proportionality is increasingly imposed as a universal principle, enshrined in most contemporary legal systems, explicitly or implicitly found in constitutional norms and recognized by national and international jurisdictions.

As a general principle of law, proportionality presupposes a relationship considered fair, between the legal measure adopted, the social reality and the legitimate aim pursued. The doctrine states that proportionality can be analyzed at least as a result of the combination of three elements: the decision taken, its finality and the factual situation to which it applies. Proportionality is correlated with the concepts of legality, opportunity and discretion[4]. In public law, a breach of the principle of proportionality is considered to be a violation of the freedom of action left to the authorities and, in the last resort, an excess of power. There is interference between the principle of proportionality and other general principles of law, namely: the principles of legality and equality, as well as the principle of fairness and justice. The essence of this principle lies in the relationship considered fair between the components.

In summary, we can say that proportionality is a fundamental principle of the law enshrined explicitly or deduced from constitutional regulations, legislation and international legal instruments, based on the values of rational law, justice and fairness and which express the existence of a balanced or adequate relationship between actions. situations, phenomena as well as the limitation of the measures ordered by the state authorities to what is necessary to achieve a legitimate aim, thus guaranteeing the fundamental rights and freedoms, and avoiding the abuse of rights.

2. Content

Many contemporary authors consider the principle that ensures the unity, homogeneity, balance and capacity of the particular normative development of society to be the principle of justice[5]. In essence, the principle of fairness and justice supposes the existence of fundamental, a priori prescriptions derived from reason or from a superindividual order and whose purpose is to give security to social life.

Proportionality expresses the content of this principle through the idea of balance between situations and social phenomena, between state and individual, but also as a "fair measure", when comparing different situations or to assess the legitimacy of decisions of state authorities.

Justice is synonymous with justice and emphasizes the ideal of fairness, which must characterize any legal relationship. The balance that it supposes and that represents proportionality is not only an abstract notion, but it also has a concrete dimension that is achieved through the equivalent of benefits, or in other words "to give everyone what they deserve". Justice protects every natural or legal person, establishes the proportion of interests in order to ensure everyone's freedom in the context of achieving the freedom of all. In the literature it has been shown that: "Justice is an absolute victory over selfishness, and whoever says justice says subordination to a hierarchy of values"[6].

It is necessary to distinguish between the values of fairness, justice and proportionality, analyzed from antiquity to the present, of theology, philosophy and law, and on the other hand proportionality as a principle of established normative law and jurisprudence. Mircea Djuvara said: "There can be no immutable principles of law that are valid for any time and any place"[7]. The author wants to say that on the one hand there are principles and values of universal law, and on the other hand their capitalization is variable according to time and place. Indeed, one is the existence of fairness and proportionality, long since law existed, and another is their formulation as principles in contemporary law as an expression of justice and fairness, given that the modern legal meanings of the principle of proportionality contain the traditional and perennial value connotations of the idea of justice.

Since ancient times, the ideas of justice and justice have been well outlined, and their content is formed by the concept of proportionality, as a way to

[2] Decision no. 139/1994 published in the Official Gazette of Romania no. 353/1994; Decision no. 157/1998 published in the Official Gazette of Romania no. 3/1999; Decision no. 161/1998 published in the Official Gazette of Romania no. 3/1999.
[3] Decision no. 71/1996 published in the Official Gazette of Romania no. 13/1996
[4] M. Guibal, "De la proportionnalité", in *L'actualite juridique. Droit administratif 5*, Dalloz, Paris, 1978, pp. 477-479.
[5] Gheorghe Mihai, Radu Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, ALL Publishing House, Bucharest, 1999, p. 127.
[6] Nicolae Popa, *Teoria generală a dreptului*, Actami Publishing House, Bucharest, 1999, p. 129.
[7] Mircea Djuvara, *Drept şi sociologie*, ISD, Bucharest, 1936, p. 11.

achieve the balance between the benefits of participants in legal relations. The purpose of justice is to exclude any discriminatory behavior between people.

Plato makes the issue of the nature, origin and purpose of the law the central issue of his political dialogues[8]. The fundamental principles of Plato's philosophy are: One, Good, Virtue, and Truth. Laws are created by people, not anyway, but as a reflection of these principles. The law is based on the rational principles, listed above, and its purpose is virtue and good, as moral realities, in the ideal state conceived by Plato. The law determines the social order, but in turn it is based on reason. Plato says that "…in a word, wherever the laws will endeavor, in all their power, to make the state as unitary as possible, it can be argued that the culmination of the political virtue has taken place there". The laws to which the state is subordinated, in Plato's philosophical doctrine, are imbued with the ideas of *justice* and *morality*. The great philosopher wants to apply the moral principles to society as a whole, but also to the behavior of each individual. In this context, the laws must be assessed from the point of view of correspondence with the principle of justice, *i.e.* on considerations superior to the legal order[9]. The laws are accompanied by a statement of reasons, which has the role of making citizens understand not only the existence of the norm, but also its necessity. The rulers, in the state conceived by Plato, are subject to the laws and cannot act arbitrarily. Platonic theory expresses an absolute confidence in law, the only one capable of limiting political power, thus preventing the formation of an authority too strong, "not temperate"[10] as a result of which the state must pursue the "union, science, and freedom"[11].

Plato argues for the need to moderate state power and subordinate the law to the principle of justice. The limitation of the power of the rulers by law, the balance and the moderation in the exercise of state authority are forms of expression of proportionality, as an element of content of the principle of justice, as Plato conceived it. The rule of law is based on the concept of justice. However, Plato conceives of a state in which individuality is considered in the background. In Plato's ideal state, the individual will unconditionally submit to the law, everything being governed by the law, from intimate life to the highest political relationship. Therefore, in Plato's philosophical conception, which is part of the ancient traditional thinking of "state – city", there is no proportional relationship between individual and state, because man is fully integrated into the state, and material equality between members of a state represents the guarantee of social harmony.

The principle of justice and implicitly the idea of proportionality are well emphasized, in Antiquity, in the work of Aristotle, many of these considerations remain valid today.

In order to define justice and law, and then to explain the nature of the state, Aristotle started from the concept of sociability: "man is by nature a social being"[12]. In this context, "justice is a social virtue, for law is only the order of the political community"[13]. In another work, Aristotle states that "law is what creates and maintains for a political community happiness and its constituent elements, and happiness in the city is given by legality and equality"[14]. For the trainee, justice as well as the law is a medium term that ensures the balance between extremes, in other words justice and implicitly the principle of justice have in their content and express the idea of proportionality.

Justice is no longer for Aristotle, as for Plato, virtue in general, but that social virtue which consists in the harmonization of interests respecting proportionality, in social relations. The legislator who wants to introduce just laws must consider the public good. Justice is equality here, and this equality of justice takes into account both the general interest of the state and the individual interest of the citizens[15]. Unlike Plato, in whom the state represents the absolute, and the human individual a simple means in achieving his goals, Aristotle notes a greater attention paid to the human individual, according to a relationship of balance, proportionality, between state and citizens, a relationship that substantiates the principle of justice.

Aristotle distinguished between *distributive justice* and *corrective justice*[16]. The first presupposed the fact of attributing to each one what is due to him, of achieving not a formal equality but a concrete one, an equivalence of the benefits on the condition of observing the distribution criteria. Distributive justice is based on *proportion*, being conceived as an equality of relations. "The justice in question here is, therefore, a *proportion*, and the injustice is that which is out of proportion, assuming on the one hand more, on the other hand less, than what is proper. This also happens

[8] Plato, *The Laws* (Bucharest: IRI, 1995); "Republic" in *Works*, 5th vol., Scientific and Encloclopedic Publishing House, Bucharest, p. 1986.
[9] Plato, *The Laws*, p. 155.
[10] *Idem*, p. 112.
[11] *Ibidem*.
[12] Aristotle, *Politics*, Antet Publishing House, Bucharest, 1997, p. 29.
[13] *Idem*, p. 7.
[14] Aristotle, *Nicomachean Ethics*, *Book I*, IRI, Bucharest, 1998, p. 28.
[15] Aristotle, *Politics*, p. 29.
[16] Aristotle, *Nicomachean Ethics*, p. 128.

in practice because the one who commits the injustice owns a larger part of the distributed good, and the unjust one, a smaller part than he deserves"[17]. Aristotle considers that justice consists in reciprocity and the existence of a common standard by which to appreciate facts. Reciprocity ensures the connections between people, respectively the legal relations, it being based on proportion, and not on equality in the strict sense.

Justice or corrective justice intervened when disputes arose between people, and the judge determined the proportion, granting the necessary compensation. It is interesting that Aristotle conceived of justice as proportion, but not purely quantitative, but as an equality that is achieved between persons participating in legal relations, through various consideration: "Justice is therefore a kind of *proportion* (for proportion is not a property only of the abstract number, but of the number in general), the proportion being an equality of relations and assuming at least four terms"[18].

The Roman jurists also contributed to the definition and understanding of the principle of justice. The Latin adage is known, which defined law as "*Jus est boni et aequi*". The idea of equity, existing in this definition, represents a dimension of proportionality. not to hurt your neighbor; to live honestly[19]. The principle of "giving everyone what is their own" expresses distributive justice, which in turn imposes the idea of proportion between the performance of the participants in the justice reports.

Proportionality, as a concept, appears in the doctrine of natural law, either by direct reference, as in the work of Jean Jacques Rousseau, or in the form of categories such as "right reason", which expresses the essence of law and signifies the idea of justice and fairness. Equality is a consequence of sociability resulting from natural law. Proportionality also appears in the analysis of the relations between the state and the citizen and of the way in which the freedom of the individual in relation to the authority of the state is conceived.

An important representative of this school is Montesquieu, who reveals in his work some ideas that involve the principle of proportionality. In Montesquieu's view, everything is subject to the action of universal laws, expressions of necessary relations which derive from the nature of things: "There is a primordial reason, and laws are the relations between it and different entities, and the relations between these entities"[20]. The author considers the law in general to be human reason, and the civil and political laws of a state are particular cases of human reason. The idea of "necessary relations" and especially the identification of the law with human reason means the principle of justice and implicitly the proportionality understood as a balanced relationship between the different entities.

One of Montesquieu's greatest contributions to legal doctrine is the theorizing of the principle of the separation of powers in the state. The essence of this theory, developed in his work "The Spirit of Law", is to prohibit the accumulation of state powers. At a first analysis it is found that the author promotes equality between powers. However, he argues that the judiciary does not play a very important role in relation to other powers. At the same time, in the author's conception, the separation of powers is achieved by reference to the law, or in this situation, the legislature becomes the dominant power in the state[21]. There is not so much equality between the powers of the state but especially a balance, based on the differentiation of roles, which is a form of the principle of proportionality. The activity of the executive and the judiciary aims at the sovereignty of the law and the assurance of the freedom of the citizen.

Related to the idea of social justice, the principle of proportionality appears explicitly formulated, or through other concepts, in the work of Jean Jacques Rousseau[22]. The social pact gives the state authority full power over all members of society. This power is not unlimited, because the state must respect the natural rights of the citizens: "It is appropriate, therefore, that the respective rights of citizens and the sovereign, as well as the duties which citizens should perform in their capacity as subjects, should be clearly distinguished from the natural rights which they should enjoy as human beings"[23]. The author's effort to harmonize the rights of the individual with sovereign power is noted. Man transmits part of his rights to the sovereign, who is animated by the general will expressed by law. On the other hand, the general will cannot annul the natural rights of the individual. In this sense, Jean Jacques Rousseau said: "We have agreed that what alienates everyone from his power, from his goods, from his freedom – through the social pact – is only that part of whose use is important for the community"[24]. This relationship between the rights of the sovereign and the

[17] Aristotle, *Nicomachean Ethics*, p. 115.
[18] *Idem*, p. 114.
[19] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *Filosofia dreptului. Marile curente*, All Beck Publishing House, Bucharest, 2002, p. 83.
[20] Montesquieu, *The Spirit of Law (1748)*, 1st vol., Scientific Publishing House, Bucharest, 1964, p. 11.
[21] Montesquieu, *The Spirit of Law (1748)*, 2nd vol., p. 200.
[22] Jean Jacques Rousseau, *The Social Contract*, Antet Publishing House, Bucharest, 1999, p. 23.
[23] *Ibidem*.
[24] *Idem*, p. 29.

natural rights of the citizen evokes proportionality and, implicitly, the idea of limiting state power, but also of harmonizing it with the natural, inalienable rights of the individual. The author believes that there must be a balanced relationship between the power of a state and its extent: "The stronger the social bond, the weaker it becomes, otherwise a small state is generally proportionally stronger than a large one"[25].

The principle of proportionality is applied to the relationship between sovereign, executive power (government) and state. "So, what is government? An intermediate body placed between the subjects and the sovereign, for their mutual connection and in charge of the application of the laws and the maintenance of the freedom, both civil and political"[26]. In Jean Jacques Rousseau's view, government is the middle ground between a sovereign and a state in a mathematical relationship of "continuous proportion". This proportion is not arbitrary, but a necessary consequence of the nature of the political body. Failure to respect the proportionality between the three terms can have consequences in the author's conception, disturbing the balance and social harmony. If the power of government increases too much in relation to that of its subjects, the rule of law and that of private judgments will be confused. This can lead to despotism. If the subjects become too strong, then anarchy prevails. "Moreover, says Jean Jacques Rousseau, none of these terms could be changed without the proportion immediately disappearing. If the sovereign wants to govern, if the magistrate wants to make the laws, or if the subjects refuse to obey, disorder instead of order, force and will no longer act in harmony, and the decomposed state falls into despotism or anarchy"[27]. Proportionality appears in this report, more in a mathematical, quantitative sense, but it is also a legal principle based on which the powers of the state are organized and the connection between the state and the individual is explained. The author reveals the nature of social relations with reference to the relationship between the individual, society and sovereign power, proportionality expressing balance and harmony, necessary for the stability of the state.

Proportionality as a way of expressing the principle of justice and fairness is also found in the work of the representatives of the rational school of law. This doctrine states that by law we must not only understand the positivist meaning, but we must also consider the rational dimension, which is the essence of law, meaning its understanding as "*jus-dike*", or in other words, as "*just measure*". This is the expression of proportionality as a rational principle of law. For rationalists, the application of proportionality to the legal norm means to give it meaning and value, while achieving the equivalence between law, understood as the totality of legal norms, and justice as a principle.

Immanuel Kant considers that law comes from reason and man can rise to the pure universal, intelligible through morality, whose fundamental concept is that of freedom[28]. For Kant, "law is therefore the set of conditions by which the arbitrator of one can agree with the arbitrator of the other following a general law of liberty"[29]. The conditions to which Kant refers impose limits on freedom in order to be able to correlate with the freedom of the other. It follows from the definition that freedom in law is a freedom of relationship, limited and constraining. Consequently, it is in accordance with the law, and therefore just any action that reconciles my freedom with the freedom of all, following a general rule. Exceeding these limits makes freedom an unjust act. A person's freedom must not harm the freedom of others but be in harmony with it. Although Kant does not explicitly refer to the principle of proportionality, *freedom as a relationship*, which is the basis of law, means balance, fairness, in a word an appropriate proportion between individual freedoms.

In the conception of Giorgio del Vecchio, who is an important representative of legal rationalism, neo-Kantian ideas constitute a reaction to legal positivism and empiricism. Giorgio del Vecchio constructs a philosophy of law starting from an a priori principle, which is the ultimate limit and on which the entire legal edifice rests. This fundamental principle is the *principle of justice*. The author makes an analysis of the Aristotelian conception of justice, criticizing the fact that in Aristotelian theory various species of justice appear, which are not deduced from a single principle. "What is essential – argues Georgio del Vecchio – in any kind of justice is the element of intersubjectivity, or correspondence in the relations between several individuals, which is found in the last analysis, even where it does not appear at first sight"[30]. The author considers that in a very general sense, justice implies a certain harmony, congruence and proportion, to which Leibnitz also referred[31]. At the same time, said the great jurist, "not every congruence or correspondence realizes – properly – the idea of justice, but only that which is verified or can be verified in the relations between several persons; not any proportion between

[25] *Idem*, p. 53.
[26] *Ibidem*.
[27] *Idem*, p. 54.
[28] Immanuel Kant, *Foundations of the Metaphysics of Morals*, Antaios, Bucharest, 1999, p. 49.
[29] *Idem*, p. 50.
[30] Georgio del Vecchio, *Justiția*, Cartea Românească Publishing House, Bucharest, 1936, p. 64.
[31] *Idem*, p. 33.

objects (whatever they may be), but only that which, in Dante's words, is a *hominis ad hominem proportio*. Justice, in its own sense, is the principle of coordination between subjective beings"[32]. Proportion is the quality of relations between persons, which only insofar as it meets this requirement means justice as a principle. The author emphasizes other features of the principle of justice, one of the most important being that the prescriptions of positive law are subject to this principle[33]. Thus, laws can be unfair if they do not correspond to the concept of "Justice", understood as a balanced, harmonious proportion between the content of the norm and social reality. In this situation, it is necessary to change the existing laws and even the existing legal order in order to achieve the imperative of Justice.

The law, as a normative act, is general, impersonal, and the legal equality it implies is formal, because the generality of the law is categorical in nature. In contrast, equality, understood as a fair proportion, as required by the principle of justice, involves the reporting of concrete situations and legal assessments to be achieved according to rigorously established criteria. Equity, understood as legal proportionality, requires taking into account the factual situations, personal circumstances, the uniqueness of the case, the relationship between the legal means used and the appropriate legitimate purpose, thus completing the generality of the legal norm. For Giorgio del Vecchio, the rule of law corresponds to the principle of justice, only if it is appropriate to the diversity of social reality, but also to the ideal of justice, as a rational value. This appropriate report is the expression of proportionality as a general principle of law.

Mircea Djuvara analyzes the principle of justice from the perspective of rational law inspired by Kantian philosophy. For the representatives of the neo-Kantian school of law, justice is transcendental. It may be, or as the case may be, not insured by law enforcement. Law as a system of legal norms is not always equivalent to the principle of justice. Prof Mircea Djuvara divided the "characteristics of justice" into rational and factual elements. As rational elements he suggested: a) equality of the parties; b) the objective (rational) and logical nature of justice; c) the idea of equity, which establishes a balance of interests in essence; d) the idea of proportionality in the conduct of justice. Proportionality would operate primarily through qualities between which relationships are established. Second, it would operate on the idea of equivalence.

Analyzing the legal report and its applicable prescriptions, the author states that the ideal of justice refers to: "the rational equality of free persons, limited in their actions only by rights and debts"[34]. This is the basis in relation to which there is the possibility of normative generalization and the consecration of the formal equality of the law without any discrimination. However, equality in principle can be achieved only by taking into account factual situations, particular factors and individual cases. The author emphasizes that the administration of justice makes necessary the idea of proportion in any legal relationship, including the criminal one: "The idea of proportion proceeds through quantities between which relations are established"[35].

Respect for the principle of proportionality is a general condition for a law to be "fair" or in other words, to be conform to the principle of justice and fairness. In this sense, the author states: "Why in the application of justice do we find the idea of proportion? The penalty must always be proportionate to the guilt. If the idea of proportion were not a rational idea, this assertion would make no sense. The idea of proportion proceeds through quantities, between which relationships are established. Rational appreciation always tends to quantify relationships. Science also aims to establish quantitative relationships; it is known that contemporary science, in any branch, is considered all the more advanced as it eliminates the subjective elements of experimental knowledge, reduces them to simple quantities and thus matures"[36]. It is obvious that for Mircea Djuvara, proportionality is a principle of rational law, which evokes the idea of justice and justice. In the desire to provide rigor and precision to the application of the legal norm, the author conceives the proportionality more, mathematically, as a quantitative ratio, between two quantities or values.

Eugeniu Speranţia, another representative of the neo-Kantian school of law, considers that the spirit is the one who leads the human activity. The need for normality and non-contradiction is realized in social life "by organizing the law, the norm and the sanction"[37]. In the author's opinion, coercion and sociability are the two elements that can define law, and both belong to rationality. Law is "a system of rules of social action, rationally harmonized and imposed by society"[38]. Normativity means that, in all his actions, man must follow certain directions and must strictly observe certain limits. The author does not refer to proportionality as a principle, but as we have noted in other situations, proportionality, even if not explicitly

[32] *Ibidem*.
[33] *Idem*, p. 56.
[34] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, p. 268.
[35] *Idem*, p. 271.
[36] *Idem*, p. 272.
[37] Eugeniu Speranţia, *Principii fundamentale de filozofie juridică*, Institutul de Arte Grafice Ardealul, Cluj, 1937, p. 7.
[38] *Idem*, p. 8.

stated, is implicit in the idea of rationality which means a certain harmonious ordering of the constituent elements of society and compliance with the rules in order to achieve social order, and ultimately justice.

George Alexianu evokes the principle of proportionality, although he does not explicitly use this concept. Referring to the role of the state in contemporary society, the author points out that it must ensure social order and guarantee individual freedoms. Its power must be limited in relation to the exercise of individual freedoms. State authorities can restrict individual freedoms only if this measure is absolutely necessary for the preservation of society. The state is only a means of guaranteeing individual freedoms. The limitation of the power of the state, the fact that the actions of the state must not exceed the purpose of their exercise, as well as the existence of the "necessity" to justify the interference of the state in the exercise of fundamental freedoms implies the principle of proportionality[39]. "The state has a duty to ensure the social order without which the life of society is not possible. By ensuring the social order, it ensures and guarantees the individual life, because the individual can only live in a society. He must demand of individual freedom only those sacrifices which are absolutely necessary for the coexistence of individuals in society. The state is therefore a means of securing individual life. "The necessary strictness to which its intervention is limited is dictated by political science"[40].

The French jurist François Geny pointed out that the rule of law is guided by the ideal of justice and that this, beyond the inclusion of basic perceptions, not to harm, not to harm another person and to give everyone what they deserve, involves deeper thought. of establishing a balance between conflicting interests in order to ensure the essential order to maintain the progress of human society[41].

Paul Roubier noted that the rule of law that aspires to govern human societies must conform to a certain ideal of justice, otherwise it will be neither respectable nor respected if it rejects that ideal. The author proposes among the values that guide law "justice as an essential value of the good order of human relations with its own qualities of equality and proportionality"[42].

For Rudolf Stammler, the law is justified in so far as the aims pursued by him are just. "Fair law" must always be in line with social aspirations. "The basis of the justice of a legal system must be sought in the fundamental law of the will. We deduce the possibility that a legal will is fair exclusively from the highest concept of free will. "Justice will therefore be the harmonization of all social wills"[43]. In our opinion, the harmony that Stammler speaks of is the expression of proportionality as a value and principle of law.

In contemporary Romanian legal literature, there are characterizations of the principles of equity and justice that imply proportionality. Thus, for Radu Motica and Gheorghe Mihai "the principle of equity implies moderation in the prescription of rights and obligations by the legislator, in the process of elaborating legal norms… This principle and equity first appeared because experience has shown that there is no perfect equality between people, absolute, this must be covered"[44]. Proportionality is perceived by legal doctrine as a form of expression of the principle of justice and justice through the idea of an equivalent, balanced, harmonious relationship between two or more values or quantities. works of authors or law schools.

The question is whether the understanding of proportionality, in relation to the general principles of law, in particular, the idea of justice, justice and fairness is relevant to contemporary law and especially to constitutional law. We consider that the answer is in the affirmative, for the following reasons:

The end of the 18th century and the beginning of the 19th century marked the accentuation of preoccupations, both in terms of legal doctrine and in the elaboration of political declarations, or normative acts, which enshrine and guarantee human rights and normative continued previous rationalist traditions and at the same time meant an emphasis on the analysis of the limits of state power and the inalienable human rights.

The fundamental question that arises in the legal doctrine of this period is: how can man be a free being, whose fundamental rights and freedoms are recognized and at the same time live in an organized society? The answer to this question depends on how the law is considered and implicitly the content of its fundamental principles. The solution of this problem has meant and means an evolution of the legal doctrine, oriented more and more towards the conciliation of the law, as an instrument of affirmation of the human being through the freedoms that must be recognized and guaranteed by law.

In the legal doctrine of the mentioned period, man is not only a citizen, a subject of law passively

[39] George Alexianu, *Curs de drept constitutional*, Casa Școalelor, Bucharest, 1930-1937, p. 149.
[40] *Ibidem*.
[41] François Geny, *Science et technique en droit positif*, 1st vol., Sirey, Paris, 1925, p. 258.
[42] Paul Roubier, *Théorie générale du Droit*, L.G.D.J., Paris, 1986, p. 268.
[43] Rudolf Stammler, *Theorie der Recktswissenschaft*, University of Chicago Press, Chicago, 1989, p. 58.
[44] Radu I. Motica and Gheorghe C. Mihai, *Teoria generală a dreptului*, ALL Publishing House, Bucharest, 2001, p. 81.

integrated into social relations, dominated by state power, but he is a person who has rights and freedoms essential for his existence, inalienable, which he can oppose to power. state. Law is increasingly understood as the "coexistence of freedoms" and not just a system of positive rules applied by the discretionary authority of the state. In this context, proportionality is found in legal doctrine both to characterize the principle of justice and to explain the increasingly complex social relations that require the recognition of individual freedoms in the context of the freedoms of all, but also to determine the limits of state power. in relation to the fundamental rights recognized to man. Proportionality is increasingly understood as a guarantee of respect for fundamental rights and a criterion for assessing the legitimacy of their restriction by the state authority.

The French Declaration of the Rights of Man and of the Citizen of 1789 enshrines the principle that people "are born and remain free and equal in rights. Freedom means being able to do everything that does not harm another". The documents with constitutional value from that period, evoke the idea according to which, if the man is born with some inalienable rights, from which no one can separate him, it means that the state power is not unlimited either. There is, therefore, a fair, proportionate relationship, on the one hand, between the recognized freedoms of each individual, and on the other hand between the liberties of the individual and state power.

The doctrine and the constitutions enshrined the principle of equality. The elimination of privileges and discrimination is a condition for any democratic state. However, the principle of equality has a formal, abstract dimension: equality before the law or equality of opportunity. Few legal concepts have supported material equality. The enshrinement of the principle of equality by the liberal doctrine in law did not mean ignoring the differences between social situations or between participants in social life. The law applied to social relations must take into account these differences, it must not be a simple uniforming factor, based on the abstract and general nature of the legal norm. Different normative regulation of different situations is an application of the principle of proportionality.

Although fundamental human rights are inherent in the human being and essential to his development, liberal legal doctrine holds that there is no equality between the private interest and the public interest, but only a fair balance, *i.e.* a relationship of proportionality, because the two social realities and legal, however, have a different nature. Therefore, the liberal doctrine in the field of law has led to the assertion of human individuality, constituted as a counterweight to statism. The liberal doctrine in law is based on the assertion of human rights, but does not support the abolition of any authority, but a society in which the power of the state is limited, only in drafting and enforcing the law, there is a balanced, proportionate relationship between the state and individuals.

An important representative of liberal doctrine, John Stuart Mill, evoked proportionality as the relationship between the fundamental rights of individuals and state power, or so to speak, between freedom and authority, two concepts which in a first analysis are mutually exclusive[45]. The author considers that a limit should be found beyond which the interference of the state in the sphere of individual independence is no longer legitimate. "Finding this limit and defending it against any violation is an indispensable condition for the smooth running of people's lives, an indispensable condition for protection against political despotism"[46]. As a result, there must be a balance between human rights and the right of the state to intervene in individual life. This balance actually means a relationship of proportionality. For the intervention of state authorities in individual life to be justified, there must be a legitimate purpose: "the only purpose which entitles men, individually or collectively, to interference in the sphere of the freedom of action of any of them is self-defense, the only purpose in which power may be legitimately exercised over any member of civilized society against his will is to prevent harm to others"[47]. The balance that the author is talking about is an application of the principle of proportionality and imposes the existence of limits for individual freedom, beyond which the authority of the state begins. The first limitation of individual liberty is not to infringe on the rights of others. The second restriction is to bear the burdens imposed by the existence of the company. This self-limitation of individual behaviors expresses proportionality in the relationships between members of society.

We also notice Alexis de Tocqueville's conception of democracy as a form of government. The basic principle of democracy, in the author's conception, is equality of conditions. Tocqueville believes that the ideal democracy is realized through the reciprocity of legal equality and political freedom, the latter signifying the possibility and the right of all to participate in government. One danger in democratic society, the author says, is "the tyranny of the majority and the tendency to centralize power"[48]. The tyranny of

[45] J.S. Mill, *Despre libertate (1859)*, Humanitas Publishing House, Bucharest, 1994, p. 7.
[46] *Idem*, p. 12.
[47] *Idem*, p. 17.
[48] Alexis de Tocqueville, *Despre democraţie în America (1840)*, Humanitas Publishing House, Bucharest, 1994, p. 160.

the majority is the result of the equality and independence of every human being in society. If everyone is right, the disproportion of believing the mass increases, so that the opinion of the majority leads the world. This danger is an obvious disproportion between the power of the state and the freedom of individuals. In order to counteract this risk, the political freedom of man must be ensured, whose role is to limit the power of the state in its relationship with individuals and at the same time, to limit individual excesses. Consequently, a balance is achieved, *i.e.*, a relationship of proportionality, between state power and individual freedoms, and man ultimately benefits from this balance.

Another representative of the liberal doctrine in law, in whose conception is found the principle of proportionality is John Rawls. His main objective is to theoretically establish a constitutional democracy. His whole conception of law is based on the principle of justice[49]. The theory of justice, in which equity plays a major role, supports the enshrinement and observance of human rights, the principle of just equality of opportunity and the principle of difference. In a democratic, pluralistic society, the idea of reasonableness plays a major role. Reasonable, in John Rawls's view, is that which brings together different situations, and which expresses "tolerance", the achievement of harmony and stability in a pluralistic society. The principle of "equal opportunities, the principle of difference, fairness and reasonableness" are categories that express, in our opinion, the proportionality in social relations. Democratic equality, in the author's conception, does not exclude the "differences", and social harmony is achieved through equitable, proportionate relations between participants in social life.

Once the state is created, it must intervene in the regulation of the social phenomena. This intervention must be well justified, it must serve a legitimate purpose, it must be done only to the extent necessary and by appropriate means that can be controlled. The existence of the state and its manifestation implies a "status of power" that creates its limits, prevents it from becoming discretionary. State power is institutionalized by law, but the law must legitimize its exercise, first and foremost by the constitution[50]. "The rule of law – said J. Chevallier – is inseparable from the representation of a minimal state, respectful of social autonomy and which does not go beyond its legitimate powers". The same author states that the doctrine of the rule of law is based on the fundamental idea of limiting power through threefold game: 1) the protection of individual freedoms; 2) the submission of power to the nation; 3) entrusting a restricted area of competence to the state. The structuring of the legal order is only a means to ensure and guarantee this limitation through the mechanisms of law creation. Thus, the rule of law covers a) a conception of public liberties; b) a conception of democracy; c) a conception of the role of the state, which constitutes the underlying basic foundation of the legal order.

The application of the principles of the rule of law posed the problem of finding a criterion for assessing the measures ordered by the state authority, in the situation when they are taken within the limits of the competence established by law. Thus, in order not to be arbitrary and discretionary, the measure ordered by a state authority must be in accordance with the law, but also adequate for the proposed legitimate purpose. The relationship between means and purpose is in the doctrine of the rule of law, but also in jurisprudence, one of the particular aspects of the principle of proportionality.

The rule of law is also based on the idea of harmony, balance between its constituent elements. This balanced relationship "is another aspect of the principle of proportionality, in fact a dimension of the general principle of fairness and justice. Thus, the analysis of fundamental rights or the perpetuation and preservation of human life, through the prism of the way of thinking of natural law, will reveal the principle of proportionality. Between the individual and the general, between the public and the private, there must be a fair measure, a balance, because "the exacerbated individual bears in himself the seal of absolutism and totalitarianism"[51], as the exaggerated and disproportionate power of the state in relation to fundamental human rights leads to same purpose: abuse of power and right. In the classical conception of natural law, taken over by the doctrine of the rule of law, law was only a "just measure", that is, proportionality.

The principle of proportionality represents in the doctrine of the rule of law the introduction of a new concept, namely legitimacy. The right that limits the power of the state is not only the "the rule of power", in the sense of "legislative power", *i.e.* to create legal norms as an expression of the will of the legislature, nor of "subjective rights", in the sense of human rights, as powers of the individual to claim something, even the state, only if these rights are recognized by objective law, as legal norms enacted by the legislator, but the law must be understood, in addition to these two meanings, which are real, and by the criterion of law as

[49] John Rawls, *Liberalismul politic (1988)*, Sedona, Bucharest, 1999, p. 8.
[50] George Burdeau, *Traité de science politique*, 4th vol., L.G.D.J., Paris, 1976; Ion Deleanu, *Drept constituțional şi instituții politice*, 1st vol. Europa Nova, Bucharest, 1996, p. 260.
[51] Louis Dumont, *Eseu asupra individualismului*, Anastasia, Bucharest, 1998, pp. 27-35.

"fair measure", in the sense of giving each He deserves it, as Aristotle said. Legitimacy, conceived as an adequate and fair measure, is the expression of the principle of proportionality[52].

The role of the state is another area of application of the principle of proportionality. The state cannot do them all, nor is it good to do them. There are objective limits to state activity, which result from the nature of things. The most important criterion for determining these limits is the principle of proportionality. In this regard, J.J. Chevallier states that social activities must, as far as possible, escape the influence of the state, which must reduce its interventions to what is strictly necessary, which means the adequacy (proportionality) of the measures adopted by the state for the purpose pursued, namely maintaining order and ensuring law enforcement. At the same time, it is better for the market and the initiative to be diffuse, spreading throughout the social body, than to be concentrated in a single body that has an exorbitant power. The balance of the social system is all the better ensured as it results more from the free play of the natural laws of functioning and not from a state regulation that risks falsifying and distort them.

3. Conclusions

The application of the principle of proportionality results in the concretization of the legal norm, the legitimacy of which is given by the fair application to each particular case or situation. At the same time, by this principle the individual is not subsumed to the general, the latter expressed by the legal norm, but has its own legitimacy, which imposes a different relationship than the logical-formal one, which confers existence and necessity only to the general. Therefore, the principle of proportionality used in its philosophical meanings imposes the right adequacy of the rule of law (of the general) to the individual who is essentially man in all his existential determinations. Thus, the legal norm is not only "legal" but also legitimate.

The question is whether the understanding of proportionality, by reference to the general principles of law, in particular, the idea of justice, justice and fairness is relevant to contemporary law and especially to constitutional law. We consider that the answer is in the affirmative, for the following reasons:

Law cannot be reduced to a positivist or normative dimension, which, we must admit, dominates the contemporary legal reality. Not every right is expressed by the rules. Therefore, the reference to principles, including the principle of proportionality, is likely to give value to normative regulations. Moreover, the application of legal norms to the diversity of individual cases cannot ignore the idea of justice, of equity, in the sense that the application of the norm must be adequate to the concrete situation, which means the observance of the principle of proportionality.

From the perspective of the idea of justice, the principle of proportionality is also important for constitutional law. The constitution is "the political and legal establishment of a state"[53]. "Moreover – says Ioan Muraru – a constitution is viable and efficient if it achieves the balance between citizens (society) and public authorities (state) on the one hand, then between public authorities and of course even between citizens. It is also important that the constitutional regulations ensure that public authorities are at the service of the citizens, ensuring the protection of the individual against arbitrary attacks by the statute against his freedom"[54]. It does not limit itself to regulating only the exercise of power. It also regulates the principles that govern society. Thus, art. 1 para (3) of the Romanian Constitution enshrines justice as the supreme value of the state and society. The term "justice" is equivalent to the principle of justice and implies proportionality. Aristotle stated that "justice is a middle term"[55], which explains why the principle of justice has a regulatory role in the application of law.

Taking this idea into account in contemporary doctrine, it has been stated that: by limiting them. It therefore has a positive role, because it ensures social cohesion and a negative one, because it ensures that none of the other principles become predominant"[56].

Schleiermacher's words are still valid today, including for any actor in the field of law: "Every scientist must philosophize in order not to remain only a crossing point of a tradition that is transmitted through him, a collector of material, because whatever representation in which neither principles nor connections are seen, it is only a material".

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[54] Ioan Muraru, *Protecția constituțională a libertăților de opinie*, Lumina Lex Publishing House, Bucharest, 1999, p. 17.
[55] Aristotle, *Nicomachean Ethics*, *op. cit.*, p. 112.
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