PRINCIPLES OF PROPORTIONALITY
CONTRIBUTIONS OF PHILOSOPHY AND JURIDICAL DOCTRINES

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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.

Key Words: *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. General comments on proportionality as a principle of law

Proportionality is a modern synthesis of some classical principles of law. This principle is at its origin, outside the law and it was imposed within the state and legal system rather late. As a principle of law, proportionality involves the ideas of reasonableness, fairness, tolerance but also the necessary adequacy of the measures to the state of facts and to legitimate purpose aimed. The fact that this principle appears inscribed in the juridical documents of European Union Law, in other states constitution, but also in Romania's constitution, explains the concerns more and more frequent for research, but mainly to identify its dimensions.

This principle is implicitly or explicitly consecrated, in the international[1]

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juridical deeds, or in the majority of the democratic [2] countries' constitutions. Romania's Constitution expressly regulates this principle in article 53, but there are also other constitutional provisions involving it. In the constitutional law, the principle of proportionality finds its application especially in the field of protection the human fundamental rights and liberties. It is considered as an efficient criterion for assessing the legitimacy of state authorities' intervention in situation of limiting the exercising of certain rights. The principle of proportionality is present in the public law of most European Union countries.

The principle of proportionality is applied not only in the constitutional law but also in other internal law branches. In the administrative law it is a criterion that allows the delimiting of the discretionary power, of the administrative authority from the power excess in respect to which is achieved the jurisdictional control of the administrative deeds for power excess[3]. At the same time it is expressly stipulated in the law as a criterion for individualizing the contravention sanctions.

Applications of the principle of proportionality exist in the criminal law[4] or in the civil law[5].

In the European Union law, the principle of proportionality is expressly provided by article 5 paragraph 4 of the Treaty regarding the European Union and it is regulated, along with the principle of subsidiarity, by the "Protocol concerning the applying of the principle of subsidiarity and proportionality", in the meaning of the

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[1] To remind on this meaning, article 29, paragraph 2 and 3 of the Universal Declaration of Human Rights, article 4 and 5 of the International agreement with regard to the economical, social and cultural rights; article 5, paragraph 1, article 12, paragraph 3, article 18, article 19 paragraph 3 and article 12 paragraph. 2 of the International agreement with regard to the civil and political rights; article 4 of the Frame - Convention for the protection of national minorities; article G the 5th part of the European Social Charta - revised; article 8, 9,10,11 and 18 of the European Convention for defending the human rights and fundamental liberties.

[2] For example, article 20, point 4; article 31 and article 55 of Spain's Constitution; article 11, 13, 14, 18, 19 and 20 of Germany Constitution or the provisions of article 13,14,15,44 and 53 of Italy Constitution.

[3] For developments see: D. Apostol Tofan, *Puterea discreţionară şi excesul de putere al autorităţilor publice*, All Beck Publishing House, Bucharest, 1999, R. A. Lazăr, *Legalitatea actului administrativ. Drept românesc şi drept comparat*, All Beck Publishing House, Bucharest, 2004, M. Andreescu, *Principiul proporţionalităţii în dreptul constituţional*, C.H. Beck Publishing House, Bucharest, 2007, I. Teodoroiu, S. M. Teodoroiu, *Legalitatea oportunităţii şi principiul constituţional al proporţionalităţii,* in: The Law no. 7/1996, pp. 39-42. See the provisions of article 1 paragraph 4 and article 2 paragraph 1 letter **m)** of the Law of Administrative Prosecution, nr. 544 /2004, republished, on which grounds the law courts can censor an administrative act for power excess.

[4] The provisions of article 74 of the Criminal Code involve the proportionality as a general criterion for judiciary individualization of sanctions. The provisions of article 19, paragraph 2 of the new Criminal Code consider proportionality as a condition of legitimate defense. Also as an example we mention the provisions of article 242 in the new Code of Criminal Procedure that involves the principle of proportionality as a condition for which is disposed by the law court the replacement of a preventive measure with another preventive measure.

[5] The proportionality criterion or proportionality as a principle is not regulated expressly in the Civil Code. In our opinion there are provisions involving it, it may be deduced by way of interpretation. We have into consideration the regulations contained by article 15 that sanctions the abuse of right, article 75 with regard to the limits of exercising the subjective rights or the regulations of article 1221 of the Civil Code that allows the cancellation of a contract for the obvious disproportion of services (the lesion).

necessary adequacy of the means and decisions of European Institutions to legitimate purpose aimed.

The jurisprudence has an important role in the analysis of the principle of proportionality, applied to concrete cases. Thus, in the jurisprudence of the European Court of Human Law, the proportionality is conceived as a just, equitable ratio, between the situation in fact, the means for restraining the exercising of some rights and the legitimate purpose aimed or as an equitable ratio between the individual interest and the public interest. Proportionality is a criterion that determines the legitimacy of the states' interfering into Romania's Constitutional Court, through several decisions determined that proportionality is a constitutional principle[6]. Our constitutional Court asserted the necessity for establishing some objective criterions, through the law, for the principle of proportionality: „it is necessary that the legislative establishes objective criteria that reflect the requirements of the principle of proportionality"[7].

Therefore, proportionality is more and more imposed as a universal principle, consecrated by most of the contemporary law systems, explicitly and implicitly found in the constitutional norms and recognized by the national and international jurisdictions.

The analysis of proportionality, in the doctrine, legislation, international treaties and jurisprudence needs to answer several key issues: 1. Whether the proportionality is a principle of law and if affirmative, whether it is a constitutional principle; 2. The rational, normative and jurisprudential significance of the principle; 3. The procedural dimension of the principle; 4. Its application in the activity for exercising the state power; 5. The significance of proportionality for human rights' protection; 6. The consecration and applying of of principle of proportionality in the Community law; the possibility of the judge, including of the constitutional one, to exercise the control in regard to the respecting of principle of proportionality and to sanction the power excess; 8. the developing of a definition for the proportionality as a principle.

As a general principle of law, the proportionality assumes a relationship considered fair, between the juridical measure adopted, the social reality and the aimed legitimate purpose. Proportionality can be analyzed at least as a result of a combination of three elements: the decision taken, its finality and the situation in fact which it applies to. Proportionality is correlated with the concepts of legality, opportunity and discretionary power[8]. In the public law, the breaching of the principle of proportionality is considered as exceeding the freedom of action, left at the disposition of authorities, and lastly, the abuse of power. There are interferences between the principle of proportionality and other general principles of law, respectively: the principle of legality and equality and the principle of of equity and justice. The essence of this principle consists in the relationship considered fair

[6] Decision no. 139/1994, republished in the Official Gazette, Part I, no. 353/1994, Decision no. 157/1998, published in the Official Gazette, Part I, no. 3/1999; Decision no. 161/1998, published in the Official Gazette, Part I, no. 3/1999.

[7] Decision no. 71/1996, published in the Official Gazette, Part I, no. 13/1996

[8] M. Guibal, *De la proportionnalité,* în L'Actualité juridique Droit administratif, no. 5/1978, pp. 477-479.

between the component elements. The question then is whether the syntagma „just relationship" is synonymous with the one of „adequate relationship" sometimes used in the doctrine. We believe that there are sometimes differences, because the concept „just" may have a moral dimension, while „adequate" does not necessarily assume this meaning also.

Summarizing, one can say that proportionality is a fundamental principle of law, explicitly consecrated or deducted from the constitutional, legislative regulations of the international juridical instruments, based on the values of the rational law, of justice and equity and expressing the existence of a balanced or adequate relationship, between the actions, situations, phenomena and between limiting of the measures disposed by state's authorities to what is necessary to achieve a legitimate purpose, in this way being guarantied the fundamental liberties and rights, and avoided the abuse of right.

2. Philosophical and juridical concepts involving the principle of proportionality

The principle of justice and implicitly the idea of proportionality are well highlighted, in antiquity, in the works of Aristotle many such considerations are remaining valid until today.

In order to get to define justice and law, and then to explain the nature of the state, Aristotle started from the concept of sociability: „man is through his nature a sociable being".[9] In this context, „the justice is a social virtue, as the right is nothing but the order of the political community".[10] In another work, Aristotle stated that "right is what creates and maintains for a community, the political happiness and its constitutive elements, and the happiness in the city is given by the lawfulness and equality"[11]. For the philosopher, the justice and law is an average term providing the balance between the two extremes, in other words the justice and implicitly the principle of justice have within their content and express the idea of proportionality.

Aristotle distinguished between the *distributive justice and the corrective justice.*[12] The first assumed the fact that each one is assigned what is in his due, to achieve not a formal equality but a corrective one, an equivalence of the services with the condition to respect the criteria for distribution. The distributive justice is based on the *proportion*, being conceived as an equality of ratios. „The justice we are talking about here is, therefore, *a proportion,* and the injustice is what it is outside the proportion, assuming on one side more and less on the other side, than it is in its due."[13] Aristotle considered that the justice consists in reciprocity and in the existence of a common standard according to which the facts are to be appreciated. The reciprocity ensures the links between people, which is the juridical relations, it being based on proportion, and not on equality in the strict sense.

The justice or the corrective justice intervened when between people litigations arise, and the judge established the proportion, granting the needed

[9] Aristotel, *Politica*, Antet Publishing House, Bucharest, 1997, p. 29.
[10] *Ibidem, op. cit.* p. 7.
[11] Aristotel, *Etica Nicomahică*, IRI Publishing House, Bucharest , 1998, Cartea I, p. 28.
[12] Aristotel, *Etica Nicomahică, op. cit,* p. 128.
[13] *Ibidem, op. cit.* , p. 115.

compensation. Interestingly is the fact that Aristotle conceived the justice, as a proportion, but not purely quantitatively, but as an equality to be achieved between the persons participating to the juridical relationships, through various counter services: „Justice is therefore a kind of *proportion* (as the proportion is not only a property of the abstract number, yet of the number in general), the proportion being an equality of ratios and is assuming at least four terms."[14]

The Romanian legal experts have brought their own contribution to defining and understanding of the principle of justice. It is known the Latin addition that was defining the law as the „*Jus est boni et aequi"*. The idea of equity, existing in this definition, represents a dimension of proportionality. The principles of law, such as they have been considered by the Romanian legal experts, are three in number: to give each one what is his; not to harm one's neighbour; to live honestly. [15] The principle „to give each one what is his", expresses a distributive justice, which at its turn requires the idea of proportion between the services of participants to justice relationships.

We note in this context the conception on law of the great theologian Thomas Aquinas, who trying to ensure the dignity of the human being within the universal space created, defined the law as the „proportion of one thing with another thing. This proportion has as purpose the establishing of equality which is subject of justice.[16] Proportionality is expressed in the juridical conception of Thomas Aquinas in another meaning also. Thus, in search of justice, man uses the ‚fair reason", which is nothing else but the achieving of the existential harmony. The fair reason is balance, and as such a balance is the „prudence". In author's conception, prudence brings the human being back to equilibrium, is a counterbalance to the absolute freedom, it limits the free will and involves the awareness of the limits imposed by the presence of other people that have the same rights. The just reason and prudence expresses the proportionality as an element of contents of the principle of justice. To be noticed that the great theologian, for the first time in the doctrine, admits the existence of the freedom limits determined by a balanced relation, proportional as we say, between the liberties people enjoy.

Proportionality, as a concept, appears in natural law doctrine, either by direct reference such as is happening in the work of Jean Jacques Rousseau, or in terms of some categories, such as the "fair reason", which expresses the essence of law and signifies the idea of justice and equity. Equality is a consequence of sociability that results from the natural law. Proportionality appears in the analysis of the relations between state and citizen, and of the way it has been conceived the individual's freedom in relation to state's authority.

One of the greatest contributions that Montesquieu has brought to juridical doctrine is theorizing of the principle of separation of powers in the state. The essence of this theory, developed in his work "About the Spirit of the Laws", is the prohibition of accumulation of state's powers. On first examination it appears that the author is promoting the equality between the powers. However he argues that the judiciary

[14] *Ibidem, op. cit.* , p. 114.

[15] For developments see N. Popa, I. Dogaru, G. Dănişor, D. C. Dănişor, *Filosofia dreptului. Marile curente,* All Beck Publishing House, Bucharest, 2002, p. 83.

[16] *Ibidem, op. cit.* , p. 91.

power does not have a very important role in relation to the other powers. However, in the author's concept the separation of state's powers is accomplished, with reference to the law, or in this case, the legislative becomes the dominant power in the state.[17] Among the powers of the state is being achieved, not as much the equality as the balance, based on role differentiation, which is a form of the principle of proportionality. The activity of the executive and of judicial power has as purpose the sovereignty of law and ensuring the freedom of 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. [18] It is noticed the author's effort to harmonize the rights of the individual with sovereign power. Man transmits a part of his rights to the sovereign that is driven by the general will expressed by the law. On the other hand, the general will can not cancel the natural rights of individual.

The principle of proportionality is applied to the relation between the sovereign, executive power (Government) and the state. "So what is the Government? An intermediate body placed between the subjects and sovereign, for their mutual connection and in charge with the enforcement of laws and the maintenance of liberty, both civil and political". [19] In Jean Jacques Rousseau's concept, the government is the average term between the sovereign and state that exist in a mathematical relation, of a "continuous proportion". This proportion is not arbitrary, but rather a necessary consequence of the nature of political body. The failure of respecting the proportionality between the three terms may have, in author's conception, consequences that would disturb the balance and social harmony. If the power of government increases too high in relation to that of the subjects, the domain of the law and of individual decisions will be mistaken. This can lead into despotism. In situation the subjects get too powerful they will then defeat the anarchy. Proportionality appears in this relation, more in the mathematical, quantitatively sense, but also as a juridical principle based on which the state powers are organized and it is explained the connection between the state and individual. The author reveals the nature of the social relations with reference to the relationship between the individual, society and sovereign power, the proportionality expressing the balance and harmony, necessary for the stability of state.

Proportionality as a way of expressing the principle of justice and equity is to be found in the work of the representatives of rational law school. This doctrine claims that by the law one must not understand only the positivist sense, but one must consider also the rational dimension which represents in fact the essence of law, meaning its understanding as "jus-dike", or in other words, as "just measure". This is an expression of proportionality as the rational principle of law. For the rationalists, the applying of proportionality to the juridical norm means to give it a meaning and value, achieving at the same time the equivalence between the right understood as the totality of the juridical norms, and justice as a principle.

Immanuel Kant believes that the right comes from reason and man can rise to the pure universal, intelligible through morality, whose fundamental concept is that of

[17] *Ibidem, op. cit.*, p.91.
[18] J. J. Rousseau, *Contractul social (1962),* Antet Publishing House, Bucharest, 1999, p. 23.
[19] *Ibidem, op. cit.*, p. 53.

freedom. [20] For Kant "the right is therefore a set of conditions by which one's arbitrator can adjust to the other one's arbitrator following the general law of liberty." [21] The conditions referred to by Kant impose limits to freedom in order to correlate with the freedom of other. Although Kant does not refer explicitly to the principle of proportionality, *freedom as a relationship*, lying at the foundation of law, means balance, equity, in a single word, an appropriate *proportion* between individual freedoms.

In Hegel's work, man loses his central place, being replaced by society. The human individual, as a person is replaced by the *subject of law*, whose reality is determined by the juridical norm. Unlike Kant, for Hegel the man becomes a simple element in a gear which he considers as absolutely alien and domineering. [22]

In Giorgio del Vecchio's concept, a prominent representative of the juridical rationalism, the neo-Kantian ideas constitutes as a reaction to juridical positivism and empiricism. Giorgio del Vecchio builds a philosophy of law starting from an *a priori* principle, which is the ultimate limit on which the whole edifice of law rests. This fundamental principle is the *principle of justice*. The author makes an analysis of the Aristotelian conception on justice, criticizing the fact that different species of justice appear in the Aristotelian theory, that are not derived from a single principle. "What is essential – claims Giorgio del Vecchio – in any species of justice is the element of inter subjectivity, or correspondence between many individuals, to be found in the final analysis, even there when he does not show at the first hearing".[23] The author believes that in a very general sense, justice involves a harmony, congruence and a certain *proportion*, also referred to by Leibnitz.[24] However, the great legal expert said, "not any congruence or correspondence is doing – in a proper way - the idea of justice, but only the one that verifies or can be checked in the relationships between several people; not any proportion between objects (whatever they are), but only the one which, in Dante's words, is a *hominis ad hominem proportio*. Justice, in its meaning, is the coordination principle between subjective beings "[25]. Proportion is the quality of relations between people, which only to the extent that meet this requirement means justice as a principle. The author emphasizes other features of the principle of justice, one of the most important being that positive law provisions are subjected to this principle. [26] Thus the laws can be unjust 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 required the changing of laws and even of the existing law order to achieve the imperative of Justice.

The law, as a normative act, is general, impersonal, and the juridical equality it implies is formal because the law generality is of category nature. Unlike this, the equality understood as a fair proportion, such as required by the principle of justice, assumes a relating to specific cases and juridical appreciations to be achieved

[20] I. Kant, *Metafizica moravurilor (1785)*, Antaios Publishing House, Bucharest, 1999, p. 49.
[21] *Ibidem*, *op. cit.*, p. 50.
[22] Hegel, *Principiile filozofiei dreptului (1831)*, I.R.I, Publishing House Bucharest, 1996, p. 22.
[23] Georgio del Vecchio, *Justiţia*, Romanian Book, Bucharest 1936, p. 64.
[24] *Ibidem*, *op. cit.*, p. 33.
[25] *Ibidem*, *op. cit.*, p. 33.
[26] *Ibidem*, *op. cit.*, p. 56.

according to rigorously established criteria. Equity, understood as a juridical proportionality, requires to be taken into account the factual situations, personal circumstances, the uniqueness of the case, the relation between the juridical means employed and the adequate legitimate purpose, thus completing the legal norm generality. For Giorgio del Vecchio, the law norm corresponds to the principle of justice, only if adequate to the diversity of social reality, but also to the ideal of justice, as a rational value. This adequate relation is the expression of proportionality as a general principle of law.

For Rudolf Stammler the law is justified to the extent that the objectives pursued by it are fair. The "just law" must always agree with the social aspirations. The fairness grounds of a juridical system must be sought in the fundamental law of the will. We deduce the possibility that a juridical will be fair exclusively from the highest concept of free will. The justice will therefore harmonize to all social wills. The harmony about which Stammler is speaking is in our opinion the expression of proportionality as value and principle of law.

The Belgian author Chaim Perelman identifies six ways of understanding the concept of justice, having as a common conceptual element the equality, but which should be adequate to social diversity. The essential function of law is to determine the categories applicable to society. Among the members of society must be equality through out various criteria: work, rank, needs etc.[27]

An important representative of the liberal doctrine, John Stuart Mill, evoked proportionality as a relationship between the fundamental rights of individuals and the state power, or in other words, between freedom and authority, two concepts that a first analysis exclude mutually.[28] The author believes that a limit had to be found beyond which the state's interference in the sphere of independence of the individual is no longer legitimate. "To find this limit and to defend it against any infringement is an indispensable condition for the good run of human life, essential for protection against political despotism"[29]. Therefore, there must be a balance between human rights and state right to intervene into individual's life. This balance means in fact a relationship of proportionality. So that the intervention of state authorities in the individual's life be justified a legitimate purpose must exist: "the sole purpose that justifies people, individually or collectively, to the interposition into the sphere of liberty of action of any of them, is the self-defense, the only goal in which the power may be exercised legitimately, on any member of a civilized society against his will, is to prevent harming the others "[30].The equilibrium the author speaks about, is an application of the principle of proportionality and it requires the existence of some limits for the individual freedom, beyond which starts state authority. The first limit of individual freedom is not to bring touch to the rights of others. The second restriction is that each one bears the tasks imposed by the existence of society. This self-limitation of individual behaviors expresses the proportionality, in the relationships between the members of society.

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[27] C. Perelman, *Justice et raison,* Press, Universitaires de Bruxelles, 1963, p. 5-120.
[28] J.S. Mill, *Despre libertate (1859),* Humanitas Publishing House, Bucharest, 1994, p. 7.
[29] *Ibidem, (op. cit),* p. 12.
[30] *Ibidem, (op. cit.),* p. 17.

To be noticed Alexis de Tocqueville's conception on democracy as a form of government. The basic principle of democracy, in the view of the author, is the equality of conditions. Tocqueville believes that the ideal democracy distinguishes through the reciprocity of juridical equality and political freedom, the latter one signifying the possibility and the right of everyone to participate to the government. A hazard that occurs in a democratic society, says the author is the "tyranny of the majority and the tendency to centralize the power"[31]. The tyranny of the majority is the result of equality and independence of each individual in society. If everyone is right, the disproportion to believe the mass increases, in other words, the view of the majority rules the world. This danger is an obvious disproportion between state power and freedom of individuals. To mitigate this risk one must ensure the political liberty of man having the role to limit state power related to the individuals and in the same time to limit individual excesses. Consequently the equilibrium is reached, which is a proportionality relationship between state power and individual freedoms, and out of this equilibrium ultimately the man benefits.

Another representative of the liberal doctrine in law, whose conception is reflected in the principle of proportionality, is John Rawls. His main objective is to substantiate theoretically a constitutional democracy. His whole conception of law is based on the principle of justice[32]. The theory of justice, in which equity plays a major role, supports the consecration and respect for human rights, of the principle of fair equality to opportunities and the principle of difference. In a democratic, pluralistic society, the idea of reasonableness plays a major role. The reasonableness in John Rawls' conception is one that brings together different situations and expresses the "tolerance", achieving the harmony and stability within a pluralistic society. The principle of the "just equality of chances, the principle of difference, fairness and reasonableness" are categories that express, in our opinion, the proportionality in the social relationships. The democratic equality, in author's conception does not exclude the "differences" and the social harmony is achieved through equitable, proportional relations, between the participants in social life.

The lawful state 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 is a dimension of the general principle of equity and justice. Thus, the analysis of the fundamental rights or the perpetuation and preservation of human life, in the light of the thinking way of the natural right, will reveal the principle of proportionality. Between individual and in general, between the public and private, should exist a fair extent, a balance because the "exacerbated individual bears in himself the seal of absolutism and totalitarianism"[33], such as the exaggerated and disproportionate state's power in respect to the fundamental human rights leads to same finality: the abuse of power of power and right. In the classical conception of natural right taken from the lawful state doctrine, the right was only a "fair measure", meaning the proportionality.

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[31] A. de Tocqueville, *Despre democraţie în America (1840),* Humanitas Publishing House, Bucharest, 1994, p. 160.

[32] J. Rawls, *Liberalismul politic, (1988),* Sedona Publishing House, Bucharest, 1999, pp. VIII.

[33] L. Dumont, *Eseu asupra individualismului,* Anastasia Publishing House, Bucharest, 1998, pp. 27-35.

The principle of proportionality represents in the lawful state's doctrine the introduction of a new concept, namely the legitimacy. The right that limits the state power is not only the "right to power" in the sense of "legislative power", which is to create juridical norms as an expression of the will of the legislature, neither the "subjective rights", in the sense of human rights, as powers of the individual to claim something, even to the state, unless such rights are recognized by the objective right, as juridical norms enacted by the legislature, but the right should be understood, in addition to these two meanings, that are real, also through the criterion of the right as a "just measure, in the meaning to give to everyone what's in his due, as Aristotle said. The legitimacy, conceived as an adequate relation is the expression of the principle of proportionality

Heinzz Mohnhaupt considers the principle of proportionality, together with other definitions of specific value, such as human dignity, freedom and juridical equality, separation of powers and powers' control, subjecting all state actions, law and right, protection of the courts, compensation for unlawful actions of the state, contrary to the law, as being important aspects of the lawful state.[34] The author invokes the principle of proportionality in the analysis he makes to the relation between the public interest (principle of social security) and the guaranteeing of the property rights. Thus, the distribution of property represents obvious antinomies within the lawful state that are not easy to reconcile. The problem is that the principle of social security can be put in a position not to be able to bring prejudice to the principle of guaranteeing the property, contained in the notion of lawful state by means of redistribution by the fiscal right. In this way, the concept of lawful state may be devoid its true meaning. Here, says the author, comes back the essential problem of the classic natural right, whose basic principle is the "principle of just measure" or in the modern version, the principle of proportionality.[35] Equally is the question for the relationship between the social security and the guaranteeing of freedom, contained in the notion of the lawful state. The borders between state's intervention and guarantees of the fundamental rights provided by the lawful state will be fixed in each case separately, by using the criterion of proportionality. [36]

One of the important issues of the doctrine of lawful state, within the German model limits, refer to the interpretation of the Constitution of the Federal Constitutional Court. The question was raised whether the fundamental law is a norm to be interpreted and applied according to the same methods as the common law or should it be interpreted according to specific techniques.[37] An important finding is that a distinction is made between *law and right*, even in the text of the Constitution. According to article 20, paragraph 3 of the German Basic Law, the "Legislative power is related to the constitutional order, the executive and judicial powers are bound and obliged by law and right." German Federal Constitutional Court, by a decision handed down on October 23rd, 1951, stated: "The Constitutional Court

[34]H. Mohnhaupt *L'État de droit en Allemagne: histoire, notion, fonction, in L'État de droit*, Presses Universitaires de Caen, 1994, pp. 88.

[35] *Ibidem*, *op. cit*, p. 88.

[36] *Ibidem*, *op. cit.*, p. 88-89.

[37] M. Fromont, *La Cour Constitutionnelle Fédérale et le droit,* in "Droit" Revue française de théorie juridique, Nr. 11/1990, p. 120.

recognizes the existence of a super-positive right that is imposed even to the Constituent and has jurisdiction as such to appreciate the compliance of a rule or juridical norm with such a right." [38] Subsequently, the Constitutional Court appreciated that by this "super positive right" understands the fundamental juridical principles. Analyzing the Constitutional Court jurisprudence, Michel Fromont notes this is practicing a very constructive interpretation of the Basic Law. The Constitutional judge carries on a "materialization" of the constitutional rule rather than an interpretation in the usual sense of the term. Through the distinction between the interpretation of the laws and their realization, the constitutional court gets nearer the issue of the fundamental juridical principles, among which the principle of proportionality.[39] In relation to these premises, the Constitutional Court has developed the great principles for interpretation of the Constitution: 1) the unity of Constitution; 2) the evolving nature of the Basic Law, and 3) binding the unwritten rules to a general principle stated by the Basic Law. Thus, from the principle of the lawful state, arising from Article 20 and 28 of the Constitution, the Court held a series of unwritten rules, among which the principle of proportionality, which requires at the same time, that the law be adequate to the situation in fact and to the purpose for which it was adopted.[40]

3. Theoretical fundamentals of proportionality shown in Romanian juridical doctrine

Mircea Djuvara analyzes the principle of justice from the perspective of rational right inspired by Kantian philosophy. For neo-Kantian school representatives of law, justice is transcendental. It may be, or where applicable, not be ensured by law enforcement. The law as a system of juridical norms is not always equivalent to the principle of justice. Professor Mircea Djuvara split the “characteristics of justice" into rational and factual elements. As rational elements he suggested: a) equality of the parties; b) by the objective nature (rational) and logic of the justice; c) the idea of equity that establishes a balance of interests in essence; d) the idea of proportionality in the development of justice. The proportionality would operate primarily through the qualities that are established between the relationships. Secondly it would operate through the idea of equivalence.

Analyzing the juridical relation and provisions applicable to it, the author states that the ideal of justice requires the "rational equality of the free persons, limited in their actions only by the rights and duties."[41] This is the grounds in respect to which exists the possibility of a normative generalizing and consecration of formal equality of the law without any discrimination. Nevertheless, the equality as a principle can not be achieved unless by taking into consideration of the situations in facts, of the particular elements and individual cases. The author emphasizes that the achieving of justice makes necessary the idea of proportion in any juridical

[38] *Ibidem, op. cit*., p. 106.
[39] *Ibidem, op. cit*, p. 122.
[40] *Ibidem, op. cit.*, p. 124.
[41] M. Djuvara, *Teoria generală a dreptului*. *Drept raţional, izvoare şi drept pozitiv*, All Beck Publishing House, Bucharest, 1999 p. 268.

relationship, including the criminal one: "The idea of proportion proceeds through quantities between which relationships[42] are being established".

Proportionality as a factor of contents of the principle of justice and equity, developed into the right. The concept about proportionality, applied to juridical, criminal and civil relationships developed and was determined by economical, social, geographical, political interests, but also in the way the people represented proportionality into juridical relationships. The author shows that there is a breakthrough of the idea of proportionality in the juridical relationships, consisting in achieving as much as possible, the *equivalence* in any juridical relationship. The existence of disparities between the services to which the subjects of law are obliged to is contrary to the principle of justice. The proportionality assumes the equity, which means the "fair appreciation", in legal terms, of each individual case.

Interestingly Mircea Djuvara did not oppose the proportionality to generality of juridical norm, on the contrary, he considers it an element of contents, through which, the concrete fact, the individual case, may be raised to the generality specific to juridical norm. Respecting the principle of proportionality is a general condition for a law be "just, or otherwise said to comply to the principle of justice and equity. In this respect the author states: "Why in the administering of justice we learn of the idea of proportion? The sanction should always be proportionate to the blame. If the idea of proportion wouldn't be a reasonable idea, this statement would have no meaning. The idea of proportion proceeds by amounts, among which are established relationships. The rational appreciation tends, ever, for amounts through which are established relationships. The science also, has as object to establish quantitative relationships; it is known that the contemporary science, in any branch, is reckoned the more advanced when are eliminated more of the subjective elements of experimental knowledge, reducing them to simple amounts and thus reaching to get matured.[43]" It is obvious that for Mircea Djuvara, proportionality is a principle of rational right, which evokes the idea of fairness and justice. In an effort to provide rigor and precision to the application of juridical norms, the author conceives proportionality more mathematically, as a quantitative relation, between two dimensions or values.

Eugeniu Speranţia, another representative of the Neo-Kantian school of law, considers that the spirit is the one leading human activity. The need for normality and non-contradiction is achieved in the social life "by organizing the law, norm and sanction"[44] According to the author, the coercion and sociability are the two elements, that may define the law and both belong to rationality. The law is "a system of norms of social action, rationally harmonized and imposed by society."[45] The normativity signifies the fact that, in all his actions, the man must follow certain guidelines and must comply rigorously with certain limitations. The author does not refer to the proportionality as a principle, but as I noted in other situations, proportionality, even if not explicitly formulated is implicitly found in the idea of rationality that signifies a

[42] *Ibidem*, *op. cit*, p. 271.
[43] *Ibidem*, *op. cit*, p. 272.
[44] E. Speranția, *Principii fundamentale de filozofie juridică*, Institute of Ardeal Graphical Arts, Cluj, 1937, p. 7.
[45] *Ibidem*, *op. cit*, p. 8.

certain harmonious ordering of the constituent elements of society and the respecting of the limits imposed by the norms in order to achieve the social order, finally of the justice. The French juridical expert Francois Geny shows that the rule of law is guided by *the ideal of just* and from now on by including of elementary precepts, not to harm, not to damage another person and to give everyone what is in his due, implies the deeper thought for establishing a balance between the conflicting interests in order to ensure the essential necessary to maintain the progress of human society. [46]

The principle of proportionality, though not expressly invoked, results from doctrinal formulations. Thus, the references to equity and justice, to the relationship between the state and citizens to the power limits in relation to the exercising of the limits of powers, but also to the limiting of the exercise of citizenship rights, evokes the idea of proportionality. We encounter such ideas in the work of some Romanian constitutionalists, Constantin Dissescu analyzing the sovereignty, considers it to be limited. The means of action of the state can not exceed the purpose in which view they are used, respectively the social good and public interest. Also, the state authority can not abolish the fundamental rights, and if it does it becomes unjust[47].

The limitation of state power against the fundamental rights is the expression of a balanced relationship between the exercise of sovereignty and its purpose, the public interest. "Sovereignty is limited. Sovereignty is not a purpose, but a means to procure happiness, which is the preservation and progress of society. Or the means, by their nature and essence are limited. Sovereignty is also limited also on the grounds that it cannot exceed the social interests' frame, the framework asked by the need for preservation and social progress. If sovereignty exceeds its limits, it becomes unjust and oppressive. In such a case appears the resistance that can go right up to a revolution. If the sovereign power suppresses the right to think freely, to communicate the ideas in writing or by speech, if is imposing religious beliefs to those who do not share them voluntarily, in such cases the sovereign power no longer has a reason for being."[48]

George Alexianu evokes the principle of proportionality, though he does not explicitly use this concept. Referring to the role of the state in contemporary society, the author shows that it should ensure a social order and guarantee individual freedoms. Its power must be limited in relation to the exercising of individual freedoms. State authorities may restrict individual freedoms only if the measure is absolutely necessary for the preservation of society. The state is only a means to guarantee individual freedoms. Limiting the state's power, the fact that state actions must not exceed the purpose of exercising them and also the existence of the "necessity" to justify the state interposition in the exercising of the fundamental freedoms implies the principle of proportionality.[49] "The state has the duty to ensure the social order without which society's life is not possible. Ensuring the social order, it provides and guarantees the individual life, because the individual cannot live unless in society. He must ask to the individual freedom only those sacrifices that are

[46] F. Geny, *Science et tehnique en droit positif,* Sirey, 1925, tom. I, p. 258.
[47] C. Dissescu, *Curs de drept public român,* Graphical Establishment Bucharest, 1890, p. 286.
[48] *Ibidem, op. cit.*, pp. 286-287.
[49] G. Alexianu, *Curs de drept constituţional,* The House of Schools Publishing House, Bucharest., p. 149.

absolutely necessary for human coexistence in society. The state is therefore a means to provide individual life ... The minimum strictly necessary to which its intervention is limited is dictated by the political science.[50]"

The idea of the Romanian historian Nicolae Iorga is interesting, which analyzing the individual freedoms such as they existed in various forms of social organization, believes that the essence of freedom means, "fair inner proportionality of the three terms", so that related to their ideal state, maximum values of the liberty both in the domain of work as in the political one, and in the thinking sphere, no historical society appears with the "*golden proportion"* of freedom, as in one we have some freedom to work but is lacking the political freedom and of thinking or vice versa. What offers this proportion a particular value are precisely the social structures. Starting in the search of the "golden number" in which optimal freedoms are combined, Nicolae Iorga will discover each time an expression, a "degraded one" thereof, as a result of the historical framework that pours its constraints over the liberty's proportion, forcing it to gain an unmistakable historical configuration and also non transposable from one society to another."[51]

State involvement in civil society, the possibility of restricting the exercise of citizenship rights in exceptional circumstances, led to the assertion in lawful state's doctrine of the principle of responsibilities of state authorities. The theory of state's responsibility is unanimous accepted. Administrative and constitutional prosecution can be considered the most significant contributions in articulating the theory of state responsibility and some of the most expressive dimensions of the lawful state.[52] In this context, the principle of proportionality is considered by doctrine and jurisprudence as an important criterion which the administrative authorities must respect because the measures disposed by them be not only legal, but also appropriate. Of course, the opportunity is not rigidly separated by the condition of the administrative acts' legality. Therefore, proportionality is not only a condition of opportunity but also a condition of legality, for public administration acts. [53]. "If we have in mind, the correlation proportionality - legality and opportunity, we note that, the implementation of proportionality requires first, the adapting of means to the finality, which is an essential aspect of the decision, and thus a matter of opportunity." [54] However, proportionality is one of the criteria limiting the discretionary power of the executive.[55]

The principle of proportionality requires the establishing of a balanced relation between the means employed by the administration and the aimed legitimate purpose. State means used must be necessary and appropriate with the purpose that aims to be achieved. It is necessary to establish a balance between a concrete

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[50] I. Bădescu, *Conceptul de libertate în gândirea lui Nicolae Iorga în: Nicolae Iorga – Evoluţia ideii de libertate*, Meridians Publishing House, Bucharest, 1987, pp. 9-10.

[51] *Ibidem*, *op. cit*, p. 149.

[52] I. Deleanu, *op. cit*. vol. I, pp. 121; T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, Lumina Lex Publishing House, Bucharest, 1998, vol. I, pp. 335-351.

[53] For developments see A. Iorgovan, *Tratat de drept administrativ*, Nemira Publishing House, Bucharest, 1996, vol. I, pp. 299-302.

[54] D.A. Tofan, *Puterea discreţionară şi excesul de putere al autorităţilor publice,* All Beck Publishing House, Bucharest, 1994, p. 47.

[55] *Ibidem*, *op. cit*, pp. 45-50.

situation, the purpose of the action and administrative decision. To the situation - a decision - finality assembly applies the principle of proportionality as a criterion for the assessing of the adopted measures. Passing over the proportionality represents the exceeding of the limits of freedom of action, left to the public administrative authorities, respectively a power excess.

Is proportionality a constitutional principle? If so, which are the constitutional meanings of this principle? To the first question the answer can only be yes. Ion Deleanu believes that: "The principle of proportionality is indisputably a constitutional principle, but in the absence of legal predeterminations of proportionality, it is a practical matter, in fact, to be checked and assessed by the competent authority before which the proportionality[56] has been invoked".

In our view, proportionality is not only a matter of fact, but also a principle that can be understood and explained through its normative dimension, including by the constitutional norms that implies it .In accordance with the doctrine of the social contract, the constitution is an original form of the social pact. It is not only a fundamental law, but also a political and state reality that "is even identified with the society which it creates or shapes."[57] The Constitution also expresses a philosophy and ideology characteristic to human society, organized as a state, it consecrates a certain form of political organization of society, guaranteeing the fundamental rights and freedoms and establishing the state power's limits. The Constitution is not confined to the establishing of the way to exercise the power, but also the essential principles, governing the society. Therefore, the essence and finality of constitution, but also of constitutionalism as a historical process, and the social reality, is to achieve a balance, a rational relation between realities and different forces, but which must coexist and harmonize to ensure the social stability, individual freedom, but also the legitimacy and functioning of the authorities exercising state power. In other words, the goal of a democratic constitution is to achieve a fair, rational balance between different realities, between individual interests and the public interest. This balanced report, which is of the essence of the constitution and constitutionalism, expresses the proportionality as a general principle of law.

From the perspective of a sense of justice, the principle of proportionality is important also for the constitutional law. The Constitution is "the political and legal settlement of a state"[58]. "Moreover - says John Muraru - a constitution is viable and efficient if achieving the balance between people (society) and public authorities (state) on one hand, then between the public authorities and of course even between the citizens. It is also important that the constitutional regulations to realize that the public authorities be in the service of the citizens, ensuring the protection of the individual against state's arbitrary attacks against its freedom."[59] It does not limit only

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[56] I. Deleanu, *Drept constituţional şi instituţii politice,* Europa Nova Publishing House, Bucharest, 1996, vol. II, p. 123.

[57] I. Muraru, S. E. Tănăsescu, *Drept constituţional şi instituţii politice*, All Beck Publishing House, Bucharest, 2003, vol. I, p. 36.

[58] I. Deleanu, *Drept constituţional şi instituţii politice,* Europa Nova Publishing House, Bucharest, 1996, vol. I, p. 260.

[59] I. Muraru, *Protecţia constituţională a libertăţilor de opinie*, Lumina Lex Publishing House, Bucharest, 1999, p. 17.

to regulate the way of exercising the power. At the same time it regulates also the principles governing the society. Thus, Article 1 para. (3) of the Constitution, consecrates the *justice*, as a supreme value of the state and society. The term "justice" is equivalent to the principle of justice and it implies the proportionality. Aristotle stated that "justice is a median term"[60], that explains why the principle of justice has a regulatory role in law enforcement.

Taking this idea in the contemporary Romanian doctrine it was asserted that "the purpose of positive regulations must be the justice so that all other principles operating in society must be subordinated to this ideal binder of all other principles and at the same time, as a regulatory principle by their limiting. It therefore has a positive role to ensure the social cohesion and a negative one, because it watches that neither of these principles becomes predominant. "[61]

Constitution, as a fundamental law, in order to be efficient, must be *adequate* to the social, economical and political realities of the state. The dynamics of these factors will determine, in the end also the changes of the constitutional norms. The appropriate ratio between the constitutional regulations and the realities mentioned, expresses the principle of proportionality. In view of those mentioned above, John Muraru, referring to the meanings of constitutionalism, says: "In the socio-legal and state contemporary realities, the constitutionalism must be seen as a political and legal complex status, expressing at least two major issues: a) on one hand, the reception in the constitution of the demands of ideas' movement (originating throughout its evolution), regarding the lawful and democratic state, civil liberties, organization, functioning and balance of the powers; b) on the other hand, a wide acceptance of law subjects, constitutional provisions. This mutual reception is the only one that can provide the efficiency and mainly the viability of constitution, can ensure a correspondence between constitutional rules and political practice "[62].

The achieving of a proper ratio between constitution and state political, ideological and economic realities is a complex issue that should not be formally understood. We emphasize that on a strictly legal plan, the constitution can define both a liberal regime and a dictatorial one. If in that kind of state, whether democratic or totalitarian, there is a constitution, it is arguable if everywhere exist a genuine constitutional regime.[63]

The concerns of the contemporary Romanian doctrinarians to establish proportionality connotations are significant.[64] The mentioned author considers as specific to proportionality the syntagma of "just balance". It is expressed the idea that "proportionality or the just balance is the objective form of dealing *in concreto* of a determined legal situation. It can appear *in abstracto*, nevertheless it remains essentially or exclusively a formal requirement without any practical effect"[65].

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[60] Aristotel, *Etica Nicomahică*, IRI Publishing House, Bucharest, 1998, p. 112.

[61] N. Popa, I. Dogaru, G. Dănişor, D. C. Dănişor, *Filosofia dreptului. Marile curente*, All Beck Publishing House, Bucharest, 2002, pp. 77-78.

[62] I. Muraru, *Constituţie şi constituţionalism*, in: Constitutional studies, Actami Publishing House, Bucharest, 1995, p. 96.

[63] I. Muraru, *op. cit.* , p. 97.

[64] I. Deleanu, *Drepturile fundamentale ale părţilor în procesul civil*, Universul Juridic Publishing House, Bucharest, 2008, pp. 365-406.

[65] I. Deleanu , *op. cit.*, pp. 364.

Answering to the question which structures are constituting the proportionality, the same author emphasizes the idea of "relation", which is specific to proportionality. Unlike mathematics, in law, the proportionality is not a quantity relationship, but a qualitative type o matter, "expressing the requirement of *adequacy* between a legitimate objective ... the *means* employed to achieve this objective and its *result* or effect produced by putting these means to work. Proportionality is marking the transition from a judgment based on binary logic to a reasoning based on a gradual logic".[66]

So we can talk about a "dialectical reasoning, proportionality con-substantial "or as we called it a "*proportionality reasoning*" based on a comparative relation of a qualitative nature, specific to value juridical syllogism designed to exceed the formalism of abstract and impersonal dimension of the juridical norm and thus to raise the particular up to the concrete universal level. For example, the principle of equality, consecrated to one of the foundations of law and of any democratic society from the perspective of proportionality that achieves a logical, value related relation between elements, different in their concreteness, they exceed their abstract nature and the inevitable trend for standardization, finding themselves as a universal concrete in a dialectical relationship between the juridical norm and the diverse of reality. Applying the "proportional reasoning" one can say that the principle of equality, regarded in its quantitative formal dimension is a particular case of the principle of proportionality.[67]

In the end of this brief doctrinaire analysis on the principle of proportionality we mention the conclusion of Professor Ion Deleanu to which we subscribe: "Thus briefly said, the putting to work of proportionality - contextualized and circumstantial - implies the transition from the rule to the *meta-rule*, from *normativity* to *normality*, from the hypostasis in front of the juridical norm to the discovery and appreciation of its meaning and purpose. The reference criterion in such a reasoning is above all, the ideals and values of a democratic society, as the only political model considered by the Convention ("European" Convention for defending the Human Rights and Fundamental Freedoms) and, thus the only one compatible with it".[68]

4. Conclusions

An argument for the philosophy of law must be a reality present not only in the field of theoretic but also for the practical work for drafting the normative acts or for the administration of justice consists in the existence of the general principles and branch ones of law, some of them being consecrated in the Constitution, such as the principle of proportionality

The need of the spirit to climb up to the principles is natural and especially persistent. Any scientific construction or normative system must relate to principles which can guarantee or substantiate. In this respect the Romanian philosopher Mircea

[66] I. Deleanu , *op. cit.*, p. 366.

[67] I. Deleanu, *Drepturile fundamentale ale părţilor în procesul ci*vil, All Beck Publishing House, *op. cit*., p. 367.

[68] For developments see M. Andreescu, *Principiul proporţionalităţii în dreptul constitutional*, *op.cit.* , pp. 317-341.

Djiuvara said: "All law science consists not in reality, for a serious and methodical research only in releasing from the multitude of law provisions their essential, which is precisely those ultimate principles of justice from which derives all other provisions. Thus, entire legislation becomes of a greater accuracy and what is called legal spirit is being grasped. Only thus is done the scientific development of a law ".

The principles of law by their nature, generality and deepness are themes for reflection primarily for the philosophy of law. Only after their construction in the sphere of law metaphysics these principles can be transferred to the general theory of law, can be normatively consecrated and applied to jurisprudence. Moreover, there is a dialectic circle because the "meaning" of the principles of law after the normative consecration and jurisprudential development are about to be elucidated, also in the sphere of philosophy of law.

The application of the principle of proportionality has as result the concretization of juridical norm, whose legitimacy is given by the just application to each case or particular situation. At the same time, by this principle, the individual is not subsumed to the general, the last one being expressed as juridical norm, has its own legitimacy, that requires a different relationship, other than the logical-formal one, which grants existence and necessity only to the general. Therefore, the principle of proportionality used in its philosophical meanings requires just adequacy of the law norm (of the general) to the individual, which in essence is the man in all his existential determinations. Thus, the juridical norm is not only "legal" but also legitimate.

Through its concrete dimension, but not empirical, the proportionality is a concept whose sphere can not be determined through a formal - logical definition. The principle of proportionality, as well as other juridical category, such as: spirit of tolerance and mutual respect, dignity, the lawful sate principles, general interest, public order, etc. are part of opened concepts category that can not be defined, but only definable. There is an ongoing process through which the connotation and denotation of some juridical categories get complete, through the inter-connection between the drafting and formulations of the philosophy of law, and on the other side the interpretations and solutions conferred by the jurisprudence.

In this context it is legitimate the question, to what extent the law metaphysics is possible and especially necessary. Such a problem is a present day one and must be analyzed within the social, political and cultural policy contemporary context, especially in relation to various juridical disciplines but also at the act of judgment by which the law courts "state the right".

Schleiermacher's words are still valid and apply today, including for any actor in the field of law: "Any scientist must philosophize not to remain only a point for the transition of a tradition that is transmitted throughout him, a material collector, as either representation in which you don’t see either principles or links, is nothing but only a material."

One can notice even presently a certain imprecision and even a restraining of the law maker for the normative consecration, on scientific grounds of the fundamental principles of law. How actual are the words of the great German philosopher Kant, which we propose for meditation to a contemporary legislator: "It's old the wish which, who knows when?, will ever be fulfilled, to discover at once, in

the place of the infinite variety of civil laws, their principles, for only in this may reside the secret to simplify, such as legislation says".[69]

[69] I. Kant, *Critica raţiunii pure*, Encyclopedic Universe Gold Publishing House, Bucharest, 2009, pp. 276-277.