

PROPORTIONALITY - A CONSTITUTIONAL PRINCIPLE

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ABSTRACT

Proportionality is a general principle of the law that signifies the ideas of equilibrium, justice, reasonability and also the necessary adequate fitting of the measures adopted by the State to the existing situation and the legitimate target aimed at.

The fact that the principle appears written expressly in the European Union, in other documents that regard the European Union, but also in the constitutions of some states, explain the most frequent preoccupations for its research and mostly to identify its dimensions.

The principle of proportionality can be analyzed from more perspectives, its concrete applications being different and causing different juridical consequences.

In this study the principle is identified and analyzed in the juridical documents of European Union.

In the Romanian constitutional law, the principle of proportionality is applied not only in case of restraining the exercise of certain rights, but also in the exercising of the state power.

Based on this analysis, we propose, in the perspective of a new revision of Romania's constitution that at item 1 a new paragraph to be added that will specify expressly the proportionality as a constitutional principle applied to the exercising of state's power.

KEY WORDS: Proportionality; Equity; Justice; Adequate ratio; Freedom of action; Appreciation margin; Human's rights; Law abuse; Restraining of some fundamental freedoms

The juridical understanding of proportionality presents some difficulties because its content depends on a certain philosophical understanding about the justice. The juridical doctrine, beginning from the ancient times until now, evokes that the proportionality is signifying the idea about order, equilibrium, rational relation, justified measure.

The proportionality is not exclusively a rational law principle, but in the same time it is a principle of the positive law, a principle with normative value. Thus, the proportionality is a juridical criterion through which it is appreciated the legitimacy of the encroachments of the state power in the field of the exercise of the fundamental rights and freedoms.

This principle is explicitly or implicitly established in the international juridical instruments¹ or by the majority of the democratic countries constitutions². Romania's

¹ We remind in this meaning, item 29, paragraph 2 and 3 of the Universal Declaration of Human's rights, item 4 and 5 of the International Pact in regard to the economical, social and political rights; item 4 of the Frame – Convention for the protection of national minorities; item G Part V-a of the European Social Chart; ; item G part V

Constitution regulates expressly this principle in item 53, but there are other Constitution dispositions that imply it.

In a most recent³ monograph it is asserted that the principle of proportionality is present in the public law of most of community countries. Nevertheless, some distinctions need to be done:

1. countries in which principle's establishing was explicitly done in the Constitution and legislation (Portugal, Switzerland etc), on one side, countries in which it is expressly evoked in the legislation or jurisprudence. In the last category could be included: Greece, Belgium, Luxembourg etc.,
2. countries in which this principle is applied to the public law per ensemble (examples: France and Switzerland), and on the other side, countries in which its use is restricted to the field of application of the community law.

In the constitutional law, the principle of proportionality finds its use mainly in the field of protection of human's rights and fundamental freedoms. It is considered a most efficient criterion for the appreciation of the legitimacy of the intervention of state's authorities in the situation when limiting the exercise of certain rights.

Much more, if the principle of proportionality is not expressly established in the constitution of one state, the doctrine and jurisprudence considers it as a part of the lawful state concept.⁴

This principle is applied in many branches of the law. Thus in the administrative law there is a limit of the discretionary power, of the public authorities and it represents a criterion for the exercise of the jurisdictional control of the discretionary administrative acts⁵. Applications of the principle of proportionality exist in the criminal⁶ and civil laws⁷.

The Principle of proportionality is to be found in the community law, meaning that the lawfulness of the community rules is not subject to the condition that the means used to be adequate to the aimed objective and will not exceed what it is necessary to reach this objective.

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 Rights, the proportionality is conceived as a fair, equitable relationship between the situation in fact, the means for restraining the exercise of certain rights and the legitimate purpose aimed or as an equitable relationship between the individual interest and the public interest. The proportionality is a criterion that determines the legitimacy of the

of the European Social Chart – revised; item 8, 9, 10, 11 and 12 of the European Convention for human rights' protection and of fundamental freedoms or item 13 of the Treaty regarding the European Economical Community.

² For example item 20, paragraph 4; item 31 and item 55 of Spain Constitution; item 11, 13, 14, 18, 19 and 20 of Germany Constitution or the dispositions of item 13, 14, 15, 44 and 53 of Italy Constitution.

³ Dana Apostol Tofan. The discretionary power and the excess of power of the public authorities, All Beck Publishing House, Bucharest 1999, page 48. To see in the same view J. Ziller, *Le principe de proportionnalité*, in *L'Actualité juridique Droit administratif*, on June 20th 1996, special number, page 185

⁴ For the development see Petru Miculescu, *The Lawful State*, Lumina Lex Publishing House, Bucharest, 1998, page 87-88 and Dana Apostol Tofan *quotation from works.*, pg.49.

⁵ See in this regard Dana Apostol Tofan, *works quotation* pg.46-50; Iulian Teodoroiu, Simona Maya Teodoroiu, *The lawfulness of the opportunity and the constitutional principle of proportionality* in the Law no. 7 / 1996, pg.39-42.

⁶ Dispositions of item 72 of the Criminal Code refer to the proportionality as a general criterion of judiciary individualization of the punishments or the dispositions of item 44 of the Criminal Code that is considering the proportionality as a condition for the defense legitimacy.

⁷ Dispositions of item 951 and 1157 of the Criminal Code, allow a contract cancellation for an evident disproportion of the services (lesions).

interferences of the contracting states in the exercise of the rights protected by the Convention.

In the same meaning, Romania's Constitutional Court, by many decisions established that the proportionality is a constitutional principle⁸. Our constitutional instance stated the need of establishing some objective criterions, by the law, for the principle of proportionality: "it is necessary that the legislative establishes some objective criterions that show the exigencies of the principle of proportionality".⁹

As a result, the principle of proportionality is imposed more and more as a universal principle established in the majority of the contemporary law systems, implicitly and explicitly found in the constitutional norms and acknowledged by the national and international jurisdictions.

The analysis of proportionality, in the doctrine, legislation, international treaties and jurisprudence needs to answer to few essential questions: 1. if the proportionality is a principle of the law, if affirmative, if 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 the state power exercise; 5. the significance of proportionality for the human's rights protection; 6. the establishing and applying of the principle of proportionality in the community right; 7. the possibility of the judge, included of the constitutional one, to exercise the control regarding the respecting of principle of proportionality and to sanction the power excess; 8. the elaboration of a definition for the proportionality, as a principle.

As a general principle of law, the proportionality assumes a relation that is considered fair, in an adopted juridical measure, the social reality and the legitimate purpose aimed.

In the doctrine it is asserted that the proportionality can be analyzed at least as a result of the combination of three elements: the decision taken, its finality and the situation in fact to which it is applied¹⁰.

The proportionality is correlated with legality concepts, opportunity and discretionary power¹¹. In the public law, the violation of the principle of proportionality is considered as being the exceeding of the liberty of action, let at the disposal of the authorities, and in the last case, a power excess¹².

There are interferences between the principle of proportionality and other general principles of the law, respectively: the principles of lawfulness and also the principle of equity and justice.

The essence of a principle consists in the relationship considered fair between the component elements. One can ask the question if the syntagm "fair relationship" is synonym with that of "adequate relationship" that is used sometimes in the doctrine. We believe that there are some differences because the "fair" concept can and will have a moral dimension, while "adequate" does not necessarily assumes this meaning.

Synthesising, we can say that the proportionality is a fundamental principle of the law that is explicitly accepted or deducted from the constitutional, legislative regulations and those of the international juridical instruments, based on the rational law values, the justice and equity ones, which express the existence of a balanced or adequate relationship

⁸ Decision no.139/1994, published in the Official Gazette no. 353 / 1994, the decision no. 157 / 1998, published in the Official Gazette no. 3 / 1999, decision no. 161 / 1998 published in the Official Gazette no. 3/ 1999.

⁹ Decision no. 71 / 1996 published in the Official Gazette no. 13 / 1996.

¹⁰ Dana Apostol Tofan, *works quotation*, page 47

¹¹ M.Guibal, *De la proportionnalité*, in *L'Actualite juridique Droit administratif*, no. 5/1978, pg.477-479.

¹² Dana Apostol Tofan, *works quotation* pg.50

between the actions, situations, phenomenons and also the limiting of the measures, disposed by the states authorities to what it is necessary to reach a legitimate purpose, thus being guaranteed the fundamental rights and freedoms, and avoiding the law abuse.

There are internal or international juridical instruments that accept explicitly the principle of proportionality. In these situations, this principle is deduced by the doctrinary interpretation, or the jurisprudential one of the law norms.

The definition proposed above expresses the proportionality as a general principle of the law.

The normative dimension of the proportionality shows its private aspects that can be identified by the doctrinary and jurisprudential interpretation of the constitutional texts.

Is proportionality a constitutional principle? If affirmative, which are the constitutional significances of this principle?

At the first question the answer cannot be otherwise, but affirmative. It was supported before that the proportionality is a fundamental principle of the law. The constitution is a part of the law, is the main source of the law. As a result, the proportionality is not a constitutional principle.

Ion Deleanu considers that: “the principle of proportionality is beyond any doubt, a constitutional principle, but in the absence of some legal predetermination of proportionality, this is a concrete matter, in fact, that is to be checked and appreciated by the competent authority in front of which, the proportionality is invoked”¹³.

In our opinion, the proportionality is not only a matter in fact, but also a principle that can be understand and explained by its normative dimension, included by its constitutional norms that it involves.

The scientific attempt to analyze the proportionality as a constitutional principle is difficult also for the fact that in the constitutional doctrine it is very little invoked and studied¹⁴.

Ion Deleanu, *works quotation.*, vol.II, pg.123

¹⁴ We mention few of the authors that in the contemporary period referred to this principle: Marius Andreescu, *Principle of Proportionality in the Constitutional Law*, C.H. Beck Publishing House, Bucharest, 2007; Ioan Muraru, Simina Elena Tănăsescu, *Constitutional Law and the political institutions*, volume I, C.H. Beck Publishing House, Bucharest, 2008; Ioan Muraru, Elena Simina Tănăsescu (coordonator), *Romania's constitution*, Comments on items, C.H. Beck Publishing House, Bucharest, Ion Deleanu, *Fundamental rights of the parties in the civil trial*, Juridical Universe Publishing House, Bucharest 2008; G. Braibant, *Le principe de proportionnalité* in *Mélancez Waline*, L.G.D.J., Paris, 1974; M. Guibal, *De la proportionnalité*, in *L'Actualité juridique*, No.5, 1978; J. Ziller, *Le principe de proportionnalité*, în *L'Actualité juridique-Droit administratif*, special number, June 20th 1996; Heinz Mohnkaupt, *L'État de droit en Allemagne*, in *L'État de droit*, Presses Universitaires de Caen, 1994; X. Phillippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelles et administratives française*, P.U.A.M. Economica, 1990; Michael Fromont, *La Cour Constitutionnelle Federale et le droit*, Revue française de théorie juridique Nr.11/1990; Hilaire Bornette, *Constitutional and Administrative Law*, Cavendish, Publishing Limited, London, 1997; Jeffrey Jowel and Jonathan Cooper, *Understanding Human Rights Principles*, Oxford and Portland, Oregon 2001; J.J. Chevallier, *L'État de droit*, Montehrstien, E.J.A. 1992. Among Romanian authors we mention: Petru Miculescu, *The Lawfull Statet*, Lumina Lex Publishing House, București, 1998; Ion Deleanu, *Institutionand constitutional procedures*, Ed. Servo-Sat, Arad 1998; Ioan Muraru și Mihai Constantinescu, *România's Constitutional Court*, București, Albatros Publishing House, 1997; Simina-Elena Tănăsescu, *Principle of Equality in Romanian Law*, All Beck Publishing House, 1999, București; Dana Apostol Tofan, *The Discretionary Power and the Power Excess of the Public Authorities*, All Beck Publishing House, București, 1999; Doina Micu, *Guaranteeing the Human Rights*, All Beck Publishing House, București, 1998; Ioan Muraru, Simina-Elena Tănăsescu, *Constitutional Law and the Public Institutions*, All Beck Publishing House, București, 2003; Bianca Selejan-Guțan, *European protection of Human Rights*, All Beck Publishing House, București 2004; Marius Andreescu, *Principle of Proportionality in the Juridical doctrine*, in *juridical and administrative studies*, no.1, 2003, Faculty of Economical, Juridical and Administrative Studies, Pitești; Marius Andreescu, *The principle of Equality and the Constitutional principle of proportionality*, în the Scientific Book of I.S.A. „Paul Negulescu”, Sibiu, 2004; Marius Andreescu, Ruxandra Andreescu, *Theoretical and practical aspects*

From the analysis of the doctrine in the matter, results the general significance of proportionality, respectively the idea of order, equilibrium, rational relation or fair measure. These determinations characterize even the concept of constitution itself, considered as being the “political and juridical fundamental background of a state”¹⁵.

In compliance with the doctrine of the social contract, the constitution is an original form of a social pact. Nor is it only a fundamental law, but also a political and state reality “that identifies itself with the society that creates and shapes it”¹⁶. Also the constitution expresses a philosophy and ideology, characteristic to the human society, it guarantees the fundamental rights and liberties and establishes the limits of the state power. The constitution does not restrict itself to establish the way the power is exercised, but also the essential principles, that govern the society.¹⁷.

The main features of European constitutionalism in doctrinary and legislative plan are considered to be: the principle of state’s power splitting, proclamation, promotion, defense and guaranteeing the fundamental inalienable human rights, definition and assimilation of the lawful state concept, appearance and development of the European model for the control of laws constitutionality.¹⁸

As a result, the essence and finality of the constitution, but also of constitutionalism, as a historical process and social reality, consist in the achievement of a balance, rational relationship between realities and different forces, that should coexist and harmonize in order to ensure the social stability, individual liberty but also the legitimacy and functionality of the authorities that exercise the state power. Thus said, the purpose of a democratic constitution lies in a fair, reasonable balance between different realities, between individual interests and the public interest. This balanced relationship, that is the essence of constitution and constitutionalism, expresses the proportionality as a general principle of law.

The connection between the constitution and the principle of proportionality can be understood differently. The sayings of the famous law maker and learned man, Solon, still wellknown and up dated, by whom he addressed himself to the Athenians, he said that he didn’t give them the best constitution, but the most appropriate. There cannot be an ideal, perfect and immutable constitution. The constitution, as a fundamental law, in order to be efficient, needs to be *adequate* to the social, economical and political realities of the state. The dynamics of these factors will determine at last the modifications of the constitutional norms. The adequate relationship between the constitutional realities and the above mentioned realities, express the principle of proportionality.

In the meaning of those above, Ioan Muraru, referring to the significances of constitutionalism, stated: ”In the social-juridical and contemporary state realities, the constitutionalism needs to be regarded as a political-juridical and complex status, that is expressing at least two aspects: a) on one side, the acceptance in the constitution of the exigencies of the idea movements (originary and in its evolution), regarding the lawful and democratic state, the public liberties, organizing, functioning and balance of powers; b) on

concerning the limitation of the exercise of a number of rights, in Proceedings, The 26th Annual Congress of the American Romanian Academy of Arts and Sciences (ARA), Montréal, Québec, Canada, 2001; Marius Andreescu, Ruxandra Andreescu, *Jurisprudence Trends of the European Court of Human Rights. Principle of Proportionality*, in the Scientific Book of I. S. A. „Paul Negulescu”, Sibiu 2003.

¹⁵ Ion Deleanu, , *quotation from works.*, vol.I, pg. 265

¹⁶ Ioan Muraru, Simina-Elena Tănăsescu, *quotation from works* vol.I, pg.36.

¹⁷ Ion Deleanu, , *quotation from works.*, vol.I, pg.265-266

¹⁸ Florin Bucur Vasilescu, *Constitutionality and constitutionalism*, Național Publishing House, Bucharest, 1990-1998, pg.16-33.

the other side, the acceptance on a large scale of the law topics of constitutional dispositions. This reciprocal acceptance is the only one that can ensure the efficiency and mainly the validity of the constitution, can ensure a concordance between the constitutional rules and political practice”.¹⁹

The achievement of an adequate relationship between the constitution and state, political and ideological realities is a complex problem that needs not be understood formally. We underline the fact that on strictly juridical plan, the constitution can define both a liberal regime, and a dictatorial one. If in the same state type, be it democratic, or totalitarian, there is a constitution, then one cannot sustain that everywhere there is a genuine constitutional regime.²⁰

Another problem is the normative – constitutional dimension of the principle of proportionality. The super naturalist concepts and the super legality doctrine, sustained by Françoise Geny, Leon Duguit and Maurice Duverger consider that the constitutional justice needs to relate to the super constitutional principles and rules.

These concepts were applied by some constitutional instances. It is famous in this meaning, the decision on January 16th 1957 of the Constitutional Federal Court of Germany in regard with the liberty to get out on federal territory. The Court stated: “The laws are constitutional only if they were enforced with the observance of the forms foreseen. Their substance needs to agree with the supreme values of the democratic and liberal orders, having the quality of a system of values established by the constitution, but mostly must be in compliance with the *elementary unwritten principles* (s.n.) and with the fundamental principles of the fundamental law, mostly with the principles of the lawfull state and the social state”²¹.

This concept was abandoned by the Constitutional Federal Court of Germany, which by a later decision established the rules for interpreting the law and the constitution: “interpretations matching the form of the norm (literary interpretation) in compliance with the context (systematical interpretation) in compliance with its purpose (teleological interpretation) and in compliance with the historical conditions for text editing (historical interpretation)”²².

Nevertheless, many authors²³ had criticized the super-legality conception, because its acceptance would have meant to leave the ground of a strict interpretation of the law rules, for the interpretation from the values’ point of view, and finally, of the interpretation through the prism of the natural and rational law and to give thus the judge an excessive power. The interpretation fulfilled by the constitutional judge cannot be abusive, discretionary, cannot (nor should it do) exceed the threshold of the role and dimensions of constitution. Finding exactly this threshold, in any process is a matter of professionalism. Beyond this threshold start the subjectivism and the arbitrary.”²⁴

The principle of proportionality, yet in its general acceptance represent the idea of justice, balance, equity, cannot be considered as a super-constitutional principle. As a principle, the proportionality is invoked by the jusnaturalist doctrines and by the juridical rationalism that is opposing the kelsian normativism.

¹⁹ Ioan Muraru, *Constitution and constitutionalism*, in : Constitutional studies, Actami Publishing House, Bucharest, 1995, pg.96

²⁰ Ion Muraru , *quotation from works* pg.97

²¹ Michel Fromont, *quotation from works.*, pg.126-127.

²² Decision on May 17th 1960, in Michel Fromont., *quotation from works.*, pg.122.

²³ On this meaning see Michel Fromont, *quotation from works.* pg.127, Charles Eisenmann, *La Justice constitutionnelle et la Haute Cour Constitutionnelle d’Autriche*, L.G.D.J., Paris, 1986.

²⁴ Ioan Muraru , *quotation from works.*, pg.98.

Nevertheless the principle of proportionality cannot be understood and applied unless in the normative content of a constitution.

The problems of the constitutional principles and their normative value made the object of a work in specialty.²⁵

It was accepted the fact that all constitutional provisions contain juridical norms. The identification of the normative contents of a constitution should be done by considering the value and the specific of the relationships regulated by the constitutional norms. Always these are the social fundamental relationships that are essential for the installing, maintaining and exercising of the power.²⁶

The constitutional norms can be split into two categories: a) with mediated application, or which give regulation in principle and are applied to concrete cases, by supplementary regulations in other branches of law and b) norms with un-mediated application that regulate directly the social relationship without the need to be mentioned by an ordinary law.²⁷

Any constitution regulates with value of juridical norm, the fundamental principle of law in general, but also with principles referring to the installing, exercising and maintainance of the state power. Thus, Romania's constitution accepts the principles of democracy that have a coordinating role for the entire law system, but also principles that are specific to some juridical institutions or branches.

The normative character of the constitutional principles results from the fact that they create genuine obligations for the law subjects, that express themselves throughout the rule of conformity of the entire law with the Constitution, included with the fundamental principles expressed through constitution norms.

The importance of the constitutional principles and the structured role for the entire law results from the nature of the social relationships regulated, fundamental and in the same time essential for the installing, maintenance and exercising of power.

To remember a definition of the concept of the constitutional principle, proposed in the literature in specialty: "this represents a general-mandatory prescription, written in the constitution, that establishes a fundamental direction of organizing and exercising of power, of political system operation, according to which are formed and function the public authorities provided with state power, are established the relationships between them and the general relations between the state and the citizens."²⁸

These principles are not immutable, they evaluate in relation to the transformations that take place in society, but are characterized by a high stability, because the revising of the constitution is done, as a rule, by derogatory procedures from the common law.

Needs to underline the role of jurisprudence, mostly that of the constitutional instances in the identification, interpretation and applying of constitutional principles.

The doctrine has tried to identify these principles²⁹ or is analyzing the constitutional principles to be applied to the fundamental rights and duties of the citizens.³⁰

²⁵ Ioan Muraru, Simina-Elena Tănăsescu, , *quotation from works.*, vol.I, pg.160-174; Simina-Elena Tănăsescu, *The Principle of Equality in Romanian Law* ; All Beck Publishing House, Bucharest 1999; Cristian Ionescu, *Fundamental Principles of constitutional democracy*, Lumina Lex Publishing House, Bucharest, 1997; Ion Stămbulescu, *Constitutional Law Principles*, Cartea Românească Publishing House, Bucharest, 1929; Romul Boilă, *The State*, Cluj, 1938.

²⁶ Ioan Muraru, Simina-Elena Tănăsescu, , *quotation from works.*, vol.I, pg.39-41.

²⁷ Ibidem, , *quotation from works* pg.19-20.

²⁸ Cristian Ionescu, *Principiile fundamentale ale democrației constituționale*, Editura Lumina Lex ,Bucuresti,1997. pg.8

²⁹ Ibidem, , *quotation from works.*, pg.8

The constitutional principles have the following characteristics analyzed in the works in speciality to which I referred:

- a) They are at the foundation of the forming and unity of the entire law system and reflect in their contents the general principles of law;
- b) They are both the result of the will of the constituent law maker, but also of the doctrinal and jurisprudential elaboration, being determined by the realities of the social system;
- c) They don't have immutable, but they are subject to the evolution of the constituent law maker, of the doctrinal and jurisprudential interpretations, but also on the social and political transformations. Being regulated by the constitution, they have a stability larger than other juridical norms;
- d) They are in a contents unit, included with the accepted principles and acknowledged by the international juridical instruments;
- e) They have a normative but also a political value. A principle can be expressed explicitly or implicitly by one or more constitutional norms. Their compulsory character results from the supremacy of constitution and the conformity of the entire law with the constitutional norms;
- f) Some principles are recognized or appreciate their content by the jurisprudential interpretation, mainly the constitutional Law Courts.

We consider that the proportionality is a constitutional principle for the following reasons: 1) it is a form of principle of justice and equity, being evoked by some constitutional categories "justice", "equity", "reasonability", "just", "tolerance"; 2) it has the constitutional principles features 3) it is accepted explicitly or implicitly by the majority of the democratic countries constitutions, but also by the international juridical instruments.

The constitutional applications of the principle of proportionality can be identified in three main fields: state organizing and state powers exercising, guaranteeing of human fundamental rights; interference with the principle of equity.

The only dispositions of Romania's constitution³¹ which refer to proportionality, as a principle, are included in item 53, which has the denomination: "Restraining of the exercise of certain rights and liberties".

The paragraph 2 establishes that "The restraining can be disposed only if needed in a democratic society. The measure should be proportional with the situation that determined it, to be applied in a nondiscriminatory way and without bringing touch to the right or liberty".

To be specified that no other previous Constitution of Romania accepted explicitly this principle.

Nevertheless, the principle of proportionality is an implicit content of the dispositions of item 19 of Constitution on 1866, item 17 of the Constitution on 1923 and item 16 of the Constitution on 1938 that established that the expropriation could only be done after "a fair and a previous compensation established by the justice". As a result, the compensation needed to be equitable, fair, which had meant proportionality.

³⁰ Ioan Muraru, Simina-Elena Tănăsescu, *quotation from works.*, vol.I, pg.160-175. There are analyzed principles such as: universality of the rights, liberties and fundamental duties, nonretroactivity of the law; equality of rights of the citizens, priority of international regulations, free access to the justice, exception feature of the restraint of the exercise of certain rights and others.

³¹ România Constitution adopted on 1991, modified and completed by the Law to revise România Constitution nr.429/2003, published in Official Gazette. No. 758 on October 29th 2003. The text of România Constitution was republished in the Official Gazette no. 767 on October 31st 2003.

In our opinion, the principle of proportionality is involved by other Romanian constitutional dispositions, but for their identification it is needed an interpretation work of the constitutional texts.

The interpretation of the constitutional norms is justified, in relation to those shown above, because any constitution is a law and it has a normative content, therefore it should be applied. Much more than an ordinary law, a constitution can contain undetermined terms, or regulations of maximum generality that justify the need for the interpretation, first by jurisprudence and then by the doctrinary way. "Constitution is not made only of its text. Even the adepts of textualist interpretation agree that certain principles, even if they are not expressed, *expressis verbis*, in the Constitution text, are presented in its spirit and cannot be ignored, or put under silence, only because they are not expressed in the text. ... The interpretation can many times avoid a situation in which the absence of establishing of a norm can be supplemented by its deduction from the context or by systematic interpretation of some norms. The text of the Constitution is considered *normative*, in the meaning that anything obviously against it, cannot be backed up, even if it cannot be an exhaustive law for the universe of the possible constitutional understandings. When we refer to the text we have into consideration the context (systematical interpretation), which many times can help for a better interpretation"³².

In the doctrine is discussed about the "constitutionality of the law"³³. An aspect of this complex process consists in the multiplication of the constitutional norms with the interpretation of the constitutional texts by the constitutional justice, which can be deducted from the express dispositions of the new Constitutions, of the new principles with constitutional value, or can determine the contents and applying criterions³⁴.

These considerents represent the scientific value by virtue of which we can proceed to a doctrinary interpretation, for the identification of the normative, constitutional dimension of the principle of proportionality.

The identification of the Romanian constitutional dispositions, that implies that the principle of proportionality can be done having into consideration the relationship between the constitutional norm and this principle. The scientific attempt is relying on the interpretation of the constitutional texts, by a *proportionality reasoning*, the difference is depending on the concrete applications of the principle.

The relationship between the constitutional norms and the principle of proportionality can be analyzed depending on its significances: proportionality, as a general principle of the law, or its private aspects.

The assertion expressed in the literature in speciality, according to which the juridical norms are related to the principles of law has at least two meanings: the norms that contain descriptions and assert most of the principles of the law, the functioning of the principles is done then by putting into application of the condition prescribed by the norm³⁵, is valid also in case of the relationship between the constitutional norms and the general principle of proportionality.

The norms do not explain the phenomenons, but improve them, while the fundamental principles have an explanatory value, they contain the background of the

³² Ioan Muraru, and others, Interpretation of Constitution. Doctrine and practice, Lumina Lex Publishing House, Bucharest 2002, pg. 9-10.

³³ Ioan Muraru, Elena Simina Tănăsescu, *Constitutional law and political institutions*, All Beck Publishing House, Bucharest, 2003, vol.I, pg.80.

³⁴ Ibidem, pg.80.

³⁵ Nicolae Popa, , *quotation from works.*, pg.16

essence of the evolution and transformations of the law”³⁶. As a result, there can be constitutional dispositions that involve the principle of proportionality, yet it does not establish it expressly.

Applied in the matter for the protection of the fundamental rights, the principle of proportionality is involved in some constitutional dispositions in the matter.

Thus, the individual liberty is regulated by item 23 of Romania’s Constitution, an item with a complex content.

The measures for the restraining of the exercise of the individual liberty (restraining, arresting, searching), regulated in detail by the constitutional dispositions, can be taken by the juridical authorities only with the strict observance of the conditions imposed by the law. The encroachment of the authorities of the state in the exercise of the individual liberties cannot be abusive. That’s why the set of guarantees that protects the person, in cases when the juridical authorities take restrictive measures, need to be adequate, otherwise said, proportional with the values that form the individual liberty.

The principle of proportionality is involved by the provisions of item 25 of Romania’s Constitution that regulates the right for free circulation. This right cannot be absolute. The provisions of item 25 paragraph (1) state that: “the law establishes the conditions for the exercising of this right”. In this meaning, the regulations referring to the identity acts, passports, crossing of the border, establishing of the domicile or residence, are norms that make the legal frame for the exercising of this right. In order not to be abusive, this legal frame need to be adequated to the finalities aimed at, which is guaranteeing the exercise of their fundamental right.

The free circulation can be restricted by the law, if this is imposed, for avoiding any severe danger, for the under aged children protection, against abandon or to fight against certain offences, or for the execution of the judge decisions³⁷. These measures need to respect the condition of proportionality, meaning to be adequate to the legitimate purpose aimed at and for the constitutional guarantees regarding the free circulation.

The provisions of item 26 of the Constitution, that regulates the right for an intimate, family and private life, involve also the principle of proportionality. The exercising of this right cannot be achieved discretionary, but adequate to the requirements of the moral and public order. Also, one must not bring touch to the rights of the others. The limits of this right, determined by the protection of other persons, need to be adequate to the constitutional guarantees in the matter.

The principle of proportionality is involved by the provisions of item 27 of the Constitution, that refer to the inviolability of the domicile. The cases in which one can enter the domicile or residence of a person, are restricted and expressly foreseen in item 27 paragraph (2) of the Constitution. The restrictive measures applied to the exercising of this fundamental right, in order not to be abusive, need to be adequate to a legitimate purpose, but also to the constitutional requirements for the protection of this right. .

Another constitutional text, that is involving the principle of proportionality, is item 30 referring to the liberty of expressing. The limits of this fundamental right are provided by the provisions of item 30 paragraph (6). The proportionality consists in this case in the relationship balanced between the two values protected by the law and at the same time the necessity that the limits of the liberty to express, to be adequate to the finality aimed, which is the one for the protection of this right.

³⁶ Ibidem, , *quotation from works.*, pg. 116

³⁷ Ioan Muraru, Simina Elena Tănăsescu, vol. I, *quotation from works.*, pg.184-185.

The provisions of item 21 paragraph (3) of the Constitution frutify explicitly the provisions of item 6 paragraph (1) of the European Convention regarding the fundamental rights and liberties' defending. The proportionality represents the content of the idea for equity that needs to characterize a law suit, in the form of existence of an equitable relationship between the divergent interests of the parties in litigation. In this meaning the C.E.D.O jurisprudence that considered that the requirements of equitability, has in consideration also the "equality of the armies, in a law suit: "The Courts reminds that the principle of equality of the armies, one of the elements of a most widened concept in regard to an equitable trial, asks for each party to have a *reasonable possibility* (s.n) to present its cause in such conditions that will not put itself in clear disadvantageously position, in relationship with its opponent"³⁸. The term of reasonable for the carry on of a judiciary procedure is appreciated depending on the circumstances of the cause and assumes the adequating of the length of such a procedure to the complexity of the cause, the behaviour of the parties, the behaviour of the public authorities, the difficulty to administer the evidences, etc. Thus said it is needed to be a reasonable proportionality relationship between the length of the juridical procedure and the circumstances of the cause.

The provisions of the item 57 establish, at constitutional level, two law principles: the principle of the exercise of the rights in good will and the duty not to violate the rights and liberties of the others³⁹.

The constitutional obligation to exercise the rights in good faith involves the existence of an adequate relationship between the exercise of the right and its social finality. In the absence of this relationship, which we appreciate as being a proportionality one, we are in the presence of the law abuse that is to be sanctioned. The "law abuse" stresses on the fact of exercising the law for reasons, or in view of purposes contrary *rațio legis*.⁴⁰

In conclusion of this analysis, we appreciate that there are two finalities most important of the constitutional principle of proportionality: the control and limiting of the discretionary powers of the public authorities and respectively the guaranteeing of the fundamental rights and liberties in situation in which their exercise could be conditioned or restricted.

The proportionality is a constitutional principle, but in most cases there is an explicit normative dedication, but the principle is deducted by different methods of interpretation from the normative texts. This situation creates some difficulties in applying the principle of proportionality.

We have to underline also the importance of this principle as a legitimacy principle of the state power exercising, within the appreciation margin, in compliance with the constitutional and legal competences.

In relation to these considerents we propose, in the perspective of a new revising of Romania's Constitution, that at item 1 whose side denomination is "Romanian state", to be added a new paragraph that is foreseeing that" *The exercising of the state power needs to be proportional and nondiscriminatory*".

Thus will be answered to more requests:

³⁸ Cauza Kreess versus France, decision on June 7th 2001.

³⁹ See Ioan Muraru, *quotation from works.*, pg.114.

⁴⁰ For development see L. Josserand, *De l'esprit des droits et de leur relativité. Théorie dite de l'abus de droit*, Dalloz, Paris, 1993, nr.245; L. Jasserand, *De l'abus de droit*, Paris, 1905; D. Gherasim, *Good faith in the civil juridical relationships*, RSR Academy Publishing House, Bucharest, 1981; Ion Deleanu, *The subjective rights and the law abuse*, Dacia Publishing House, Cluj Napoca, 1988.

- a) The proportionality is established expressly as a constitutional general principle and not only with restrained applying in case of restraining the exercising of the fundamental rights and liberties, such as one can consider currently, having in consideration the provisions of item 53 of the Constitution;
- b) This new constitutional provision corresponds to some similar regulations contained in the juridical norms of European Union
- c) This new regulation would represent a genuine constitutional obligation for all state's authorities to exercise their duties such as all adopted measures would get within the limits of discretionary power limits acknowledged by the law and would not represent a power excess;
- d) To create the possibility for the Constitutional Court to sanction, by means of constitutionality control of the laws and ordinances, the excess of power in the activity of the Parliament and Govern, using the principle of proportionality as a criterion;
- e) There can be achieved a better correlation between the principle of proportionality and the principle of equality.